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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 624.

SWIFT & COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA,
AFL, LOCAL 88,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

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AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA,
AFL, LOCAL 88,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Swift & Company, a corporation, prays that a Writ of Certiorari issue to bring before the Supreme Court of the United States for review a final judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case No. 12,931 on Sep-

tember 13, 1956, refusing to Review and Amplify an Order of the National Labor Relations Board.

Your Petitioner respectfully shows:

CITATIONS TO OPINIONS BELOW.

The decision of the National Labor Relations Board is reported as 113 NLRB No. 31 and is printed in the Record at pages 202-222. The opinion of the United States Court of Appeals for the District of Columbia Circuit on petitions to review that Board decision is reported at 237 Fed. (2) 20, ... App. D. C. ..., 30 Labor Cases, paragraph 70061, and is printed in the Record at pages 225 to 236 and in Appendix A, hereto, p. 17, infra. The supplementary opinion of the Court of Appeals in denying petitions for rehearing, is reported at 237 Fed. (2) 27, ... App. D. C. ..., 31 Labor Cases, paragraph 70214, and is printed in the Record at pages 256 to 257 and in Appendix B, hereto, p. 29, infra. A second petition for rehearing by the Intervenor Union in the companion case was denied October 8, 1956, without further opinion.

JURISDICTION.

For proceedings in the Court of Appeals below, this case (No. 12931) was consolidated for briefing and argument with a cross-appeal (No. 12891) from other portions of the same Board order filed by the Intervenor Union in this case. The principal opinion and judgment [R. 225-236, 236 (b)] of the Court of Appeals were handed down June 22, 1956, and were applicable to both cases. The Decree enforcing the Board's order as interpreted by the Court's opinion was filed July 23, 1956 (R. 237-239). Appendix D, infra. This Petitioner, and the Intervenor, both filed timely petitions for rehearing in their respective cases which the Court of Appeals simultaneously denied in a

single supplementary opinion on September 13, 1956. This Petitioner filed and presented this petition for a Writ of Certiorari, and the Record, to this Court on December 12, 1956, which is within ninety days from September 13, 1956, the date of entry of the Decree sought to be reviewed[1] (28 U. S. C., Sec. 2101).

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code, providing for review by this Court by certiorari of cases in the United States Courts of Appeals after rendition of judgment or decree. This case was properly before the United States Court of Appeals for the District of Columbia Circuit on the Petition for Review of an Order of the National Labor Relations Board pursuant to Section 10 (f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, Secs. 151 et seq.).

QUESTIONS PRESENTED.

1. The Union has induced and encouraged its members, who are butchers employed in the retail markets throughout the metropolitan St. Louis, Missouri, area, to concertedly refuse in the course of their employment to order or buy the products of Swift & Company because the salesmen of that Company were not members of the Union. The same identical inducement and encouragement occurred in the retail stores and in union meetings. The National Labor Relations Board and the United States Court of Appeals have both held that such inducements violate Section 8 (b) (4) (A) of the Act when they occur at the retail markets.

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[1] The Intervenor Union herein, as petitioner in the cross-appeal No. 12891, filed a motion for leave to file a "second petition for rehearing". There is no specific provision in the rules for such a pleading. On October 8, 1956, the Court of Appeals simultaneously granted the motion for leave to file and denied the second petition for rehearing without further opinion.

The first question presented is whether the same identical inducements when made in union meetings or through union bulletins are somehow immunized from, and therefore not a violation of, the provisions of Section 8 (b) (4) (A) of the National Labor Relations Act.

2. The second question presented is whether the National Labor Relations Board, having proceeded to final decision and order, and having found that such inducements made to union members in the shops where they were employed violated the Act, erred in failing to consider and determine the issue of whether the same inducements shown by the undisputed evidence to have been made in union meetings and union bulletins also violated Section 8 (b) (4) (A) of the Act.

3. The third question presented is whether the Court of Appeals below erred in failing or refusing to modify the Board's order so as to require the Union to cease and desist from such inducements in union meetings, in union bulletins, or elsewhere, and decree enforcement as so modified, or in the alternative, to remand to the Board for such purpose, in order to conform the decision in this case to the law as announced in previous decisions of this Court.

STATUTES INVOLVED.

The statutory provisions principally involved are Sections 7, 8 (b) (4) (A), and 10 (a through f) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 61 Stat. 136, Title 29, U. S. C., Section 151 et seq. These provisions are fairly lengthy and are printed verbatim in Appendix C, hereto, infra.

STATEMENT OF THE CASE.

This case arose out of efforts of Local 88 of the Meatcutters' Union[2] to induce and encourage its members who were employed in retail meat markets in the St. Louis area to boycott the products of Swift & Company in violation of Section 8 (b) (4) (A) of the National Labor Relations Act. This Union-induced boycott was a part of the Union's indirect efforts to impose membership on the white collar salesmen of the St. Louis Independent Packing Company plant of Swift & Company in St. Louis, the Union officials and business agents having made no efforts to persuade such salesmen to join the Union through normal direct means.

On charges filed on behalf of Swift & Company by its attorneys [Gen. Counsel's Exh. 1 (A)] a complaint was issued by the Regional Director of the Board [G. C. Ex. 1 (c)] on April 20, 1954, and as required by the Act, the Regional Director simultaneously instituted proceedings in the United States District Court under Section 10 (L) of the Act seeking a temporary injunction against the Union's boycott pending final decision by the Board itself. The District Court granted such temporary injunction on July 30, 1954 (R. 1-7).

The original charge filed, the complaint issued, and the District Court's temporary injunction all dealt broadly with the Union's general course of continuously and repeatedly urging, inducing, and encouraging its members who were employed in the retail meat markets to refuse in the course of their employment to purchase, handle or display for their employers the products of Swift & Company for objectives proscribed by the Act. The allegations

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[2] Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, hereafter called the Union.

of the charge, complaint, and temporary injunction were broad enough to cover **all such illegal inducement and encouragement by the Union wherever it occurred,** whether in Union meetings, Union bulletins, retail markets, or otherwise, as well as the more specific and limited inducement at the members' places of employment which the Board ultimately considered and ruled upon.

The Board's opinion (R. 202) treated the subject of the Union's activities in illegally urging their members to boycott Swift & Company products through appeals made to their members **at their place of employment** very fully, overruled the various Union defenses, and directly found and held that such inducements violated Section 8 (b) (4) (A) of the Act.

The Board, however, declined to pass upon the question of whether the Union's conduct **in its Union meetings** and through circulation of bulletins, which were intended to induce and did induce exactly the same refusal to purchase or order the products of Swift & Company by the Union members as did the inducements occurring at the members' places of employment, amounted to a violation of Sections 8 (b) (4) (A and B) of the Act. The Board stated that, having found that those Union activities specifically treated in its opinion violated Section 8 (b) (4) (A), "we do not find it necessary to consider or pass upon the Union's additional conduct within its own organization" (R. 208).

Both Swift and the Union sought review of that Board decision. The Union in Case No. 12891 contested the Board's decision that its conduct in inducing and encouraging an illegal boycott **at the markets** violated the Act. The Court of Appeals unanimously agreed with the Board and held "that the Board did not err." It held that the Board's order would be enforced "insofar as it prohibits

such inducements and any similar ones occurring at the markets" (R. 235).

Swift & Company, in Case No. 12931, contested the Board's arbitrary refusal to "consider or pass upon the Union's additional conduct within its own organization," contending that the Act itself prohibited all illegal inducement regardless of the physical location where it occurred and that the decisions of this Court had so announced.[3] Swift & Company urged that the Board's order should be modified to prohibit all illegal inducements as violations of the Act wherever they occurred, and sought enforcement as so modified. On this point, the Court of Appeals agreed there was ambiguity in the Board's orders, but did "not feel free to dispel it in the manner requested by Swift." The Court noted that the Board had refused to pass on the legality of the appeals made in union meetings, and that there was doubt how the Board would have decided if it had considered and passed on that issue. The Court concluded that it was not mandatory for the Board to decide that issue and refused to either modify the Board's order or remand to the Board for further proceedings (R. 257).

Thus the situation is presented where a complaint filed in April, 1954, alleged that the union was guilty of illegal inducement and encouragement of an unlawful boycott in violation of Section 8 (b) (4) (A). Such illegal inducements occurred physically both at retail markets where the members were employed and in union meetings where the same identical members were gathered. The evidence was admitted and uncontradicted that, except for the physical location of their utterance, the inducements

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[3] International Brotherhood of Electrical Workers Local 501, AFL, vs. NLRB, 341 U. S. 694, 95 L. Ed. 1299, 71 S. Ct. 954; NLRB v. Denver Building and Construction Trades Council, 341 U. S. 675, 95 L. Ed. 1284, 71 S. Ct. 943.

were identical in every respect. The entire problem, involving all such inducements wherever uttered, was prosecuted through the entire statutory procedure. Both the NLRB and the Court of Appeals agree that the Union's conduct clearly violated the Act and the Board's order has been granted enforcement.

The Board arbitrarily declared that it did not "find it necessary" to consider whether the identical conduct in union meetings violated the Act as did the same conduct at some other physical location. When the Court of Appeals refused to correct that omission or to remand to the Board with instructions to "consider and pass upon" that vital issue, a situation was created where 2½ years of vigorous litigation was brought to an end in a final decision that refused to decide one of the principal issues in the case.

Petitioner submits that the situation thus created is directly contrary to the specific provisions of Section 10 (c) of the Act (Appendix, page 34, post) which requires the Board on final decision to grant or deny relief by its final order. That Section leaves no alternative course of refusing to consider an important issue. That situation is directly contrary to Section 10 (f) of the Act (Appendix, page 35, post), granting the Court of Appeals power to review the Board's order and modify it in whole or in part. Further, the final result of this Court of Appeals decision fails to follow and is in conflict with this Court's decisions in **International Brotherhood of Electrical Workers, Local 501, A. F. L., v. N. L. R. B.**, 341 U. S. 694; **N. L. R. B. v. Denver Building and Construction Trades Council**, 341 U. S. 675; and the Seventh Circuit decision in **Joliet Contractors Association v. N. L. R. B.**, 202 F. (2) 606.

As stated in the Jurisdictional Statement, supra, this case was properly before the United States Court of Ap-

peals for the District of Columbia Circuit, whose Judgment and Decree are here sought to be reviewed, on a Petition to Review an Order of the National Labor Relations Board, pursuant to the specific authority of Section 10 (f) of the National Labor Relations Act, as amended. [61 Stat. 136, 29 U. S. C., Section 160 (f); Appendix C, hereto, p. 31, infra.)

ARGUMENT AMPLIFYING REASONS FOR GRANTING THE WRIT.

1. The United States Court of Appeals for the District of Columbia Circuit has in this case decided an important question of federal law in a way in conflict with applicable decisions of this Court. The decision below adopts an interpretation and construction of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended, that directly contradicts two of the controlling principles announced in I. B. E. W. v. NLRB, 341 U. S. 694, and NLRB v. Denver Building & Construction Trades Council, 341 U. S. 675, in that it grants unwarranted immunity from the prohibition of that Section to conduct which this Court has declared to be within the proscription of the Act and not entitled to such immunity. The opinion below further permits the Union to attain, through indirection, objectives directly proscribed by the Act, contrary to the express holding of this Court in the above cases.

2. The decision of the Court of Appeals below on the same points regarding the construction and application of Section 8 (b) (4) (A) of the Act, also conflicts with the decision of the Seventh Circuit Court of Appeals in Joliet Contractors Association v. NLRB, 202 Fed. (2) 606, which specifically relies on the above decisions of this Court.

3. The Court of Appeals below has also decided an important question of federal law which has not been, but

should be, directly settled by this Court, in that it has interpreted and construed Section 10 (c) of the Act, contrary to the express language of that Section which requires the Board to either grant or deny the relief requested by its final decision and order. In so doing, the Court of Appeals below has permitted the Board to abdicate its mandatory duty, thereby failing to give proper effect to the meaning of decisions of this Court and the Third Circuit Court of Appeals. Garner v. Teamsters, 346 U. S. 485; Jacobsen v. NLRB, 120 F. (2) 96.

4. The Sections of the Act, thus erroneously construed, are two of the most widely invoked and frequently involved sections. Almost every case of conduct violating Section 8 (b) (4) (A) could avoid the direct prohibition therein and obtain immunity by achieving the same prohibited objective in the indirect manner here permitted. The construction of Section 10 (c) of the Act, adopted below, which permits the Board to abdicate its duty to decide by its final decision and order, is potentially applicable to every case the Board prosecutes to final decision. The widespread importance and general application of the Questions Presented is therefore evident.

In this case both the National Labor Relations Board and the United States Court of Appeals (District of Columbia Circuit) have considered and passed upon the Union's general course of conduct in illegally inducing a secondary boycott. Both the Board and the Court held that the Union's conduct directly violated the express provisions of the Act.

However, after prosecuting this case to final hearing and decision, after vigorous litigation consuming over two years, after compiling a complete record, the Board arbitrarily and without justification decided in its final opinion that it was not necessary to consider or pass upon one of

the principal issues thus litigated. The conduct which the Board thus ignored was identical to the conduct which the Board and the Court both held to be clearly illegal in every respect save one—the physical location at which the different instances of illegal inducement occurred. In both instances the same Union officers expressed the same identical inducement and encouragement to the same secondary employees of the same neutral retail markets to engage in the same refusal to buy Swift's products for their employer for the same prohibited objective. Where such Union conduct occurred on the premises of a neutral employer, it was held to violate the Act. Where the same conduct occurred in Union meetings or in Union Bulletins, the Board did "not find it necessary to consider or pass on" such conduct.

The unambiguous language of Section 8 (b) (4) (A) of the Act permits no exception of such illegal inducements from its prohibition based on that or any other distinction.

This Court has specifically held that the words "induce and encourage," as used in that section, must be given their usual dictionary meaning, are broad enough to include **all** forms of influence and persuasion, and permit no exemptions. In **International Brotherhood of Electrical Workers, Local 501, AFL, v. NLRB**,[4] the Court disposed of a contention that Section 8 (c) of the Act, the so-called "free speech" section, "immunizes peaceful picketing even though the picketing induces a secondary boycott made unlawful by Sec. 8 (b) (4)." l. c. 341 U. S. 701. The Court was thus faced with a situation at least as difficult, if not more difficult, than the one here presented. The "inducement" claimed to be immunized was peaceful picketing, a type of union conduct that has historically and traditionally been granted every possible protection by the Courts,

[4] 341 U. S. 694, 95 L. Ed. 1299, 71 S. Ct. 954.

and immunity was claimed to flow from a specific section written into the Act itself allegedly qualifying the scope of Section 8 (b) (4). In the course of its opinion in the I. B. E. W. case, l. c. 341 U. S. 701-703, the Court said:

> "To exempt peaceful picketing from the condemnation of Sec. 8 (b) (4) (A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words 'induce and encourage' are broad enough to include in them every form of influence and persuasion.
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> * * * * * * *
>
> "To exempt peaceful picketing from the reach of Sec. 8 (b) (4) would be to open the door to the customary means of enlisting the support of employees to bring economic pressure to bear on their employer * * * 'To find that peaceful picketing was not thereby proscribed would be to impute to Congress an incongruous intent to permit, through indirection, the accomplishment of an objective which it forbade to be accomplished directly.' "

Certainly inflammatory appeals made in union meetings is one of the "customary means of enlisting the support of employees" on which this Court specifically closed the door to immunity in the above quotation.

The fact, noted by the Court below in its opinion [R. 236 (a)] that a prior Board decision (Western, Inc., 93 NLRB 336) raised some doubt as to how the Board might have decided this issue if the Board had considered it, can have no bearing in view of this Court's subsequent decision in the I. B. E. W. case above quoted. Whatever that early Board decision may have implied, it is clear that the Board now would be required to follow the later controlling decisions of this Court to the contrary.

In International Union v. WERB, 336 U. S. 245, loc. cit. 260, this Court stated that Section 7 of the Act does not give employees "any right to engage in unlawful or other improper conduct," and approvingly quoted the House Committee Report on the Act, as follows:

> "* * * it was stated specifically that the rights set forth were **not** to be considered as including the right **to commit or participate in unfair labor practices, unlawful concerted activities,** or violations of collective bargaining contracts." (Emphasis added.)

It thus seems abundantly clear that while Section 7 protects **lawful** concerted activities, under no circumstances can it be said to condone or protect in any way concerted activities which in themselves constitute or form a part of **unlawful** concerted activities, regardless of whether such activities are generally considered protected or not.[4a]

In the I. B. E. W. case, 341 U. S., loc. cit. 704, this Court announced the principle that prevents the granting of immunity to special instances of illegal inducement as permitted by the Court below:

> "e. The remedial function of Sec. 8 (c) is to protect non-coercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing **in furtherance of unfair labor practices** such as are defined in Sec. 8 (b) (4). **The general terms of Sec. 8 (c) appropriately give way to the specific provisions of Sec. 8 (b) (4).**" (Emphasis added.)

[4a] This corollary has been clearly established with regard to the usually protected right to picket. See Building Service Employees v. Gazzam, 339 U. S. 532, 94 L. Ed. 1045, 70 S. Ct. 784; I. B. T. v. Hanke, 339 U. S. 470, 94 L. Ed. 995, 70 S. Ct. 773; Hughes v. Superior Court, 339 U. S. 460, 94 L. Ed. 985.

Whether immunity for given conduct is claimed under Section 7 or Section 8 (c) the answer in either case is that even the exercise of what would ordinarily be a protected right becomes and is unlawful when its direct purpose is to incite and induce a violation of Section 8 (b) (4).

These controlling principles make it impossible to treat a union meeting as a sanctuary from which an illegal boycott can be induced and directed with impunity.

On the admitted, uncontradicted evidence in the record, and under those controlling decisions, the Board would have been required to find the additional inducements were violative of the Act if it had performed its duty to consider and pass upon them.

The Board, though it had proceeded to final decision in the proper exercise of its discretionary authority, neither granted nor denied the relief requested against such conduct. Instead, it specifically refused to decide either way. In so doing the Board erred, because Section 10 (c) of the Act requires the Board to grant or deny relief by its final order in a manner reviewable by the Courts of Appeals under Section 10 (f). The Act gives the Board no discretionary authority to abdicate its decisionary function at this stage of proceedings. The Board had a duty to decide. Garner v. Teamsters, 346 U. S. 485; Jacobsen v. NLRB, 120 Fed. (2) 96 (3 Cir.).

While those portions of Section 10 of the Act dealing with the Board's procedures before and after rendition of a final decision and order use such words as "may," "is empowered," or "in its discretion," Section 10 (c) dealing with the decision itself conversely directs that the Board "shall" state the facts and "shall issue" an order either: (a) "requiring" such person to cease and desist if an unfair labor practice has been committed; or (b) "dismissing

the said complaint" if no unfair labor practice was committed. Significantly, there is provided no third alternative to withhold relief or refuse to decide issues in its discretion.[5] The power which the Board exercised and described in its brief below as a discretionary power to "refrain from adjudicating" at "every stage" of the proceeding, is therefore contrary to the express language of the statute.

In failing to correct these errors of the Board in the review proceedings before it, and by, in fact, sanctioning and perpetuating the Board's errors, the Court of Appeals also erred. The action requested of the Court of Appeals on review was clearly within its proper power and authority. NLRB v. Gullett Gin Co., 340 U. S. 361; May Dept. Stores v. NLRB, 326 U. S. 376; Joliet Contractors' Assn. v. NLRB, 202 F. (2) 606 (7 Cir.).

The construction and interpretation of the Act adopted by the Board herein, and sanctioned by the Court of Appeals, permitting an abdication of the Board's duty to decide by its final order after complete litigation, directly conflicts with this Court's interpretation of the Board's function in Garner v. Teamsters, 346 U. S. 485, which noted the Board's "duty of primary decision." If the Board's claim of power to abdicate, as here asserted, were sustained it would threaten the fundamental basis of recent decisions of this Court in the field of federal-state jurisdiction over labor controversies. Those decisions barred state action because the Board had the power "and duty" of primary decision.

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[5] See Jacobsen v. NLRB, 120 F. (2) 96, 101 (3 Cir.): "* * * the Board, having issued its complaint and proceeded to hearings, had the duty to decide * * * and in our opinion it was error for the Board not to do this."

See also Garner v. Teamsters, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161: "The power *and duty* of primary decision lies with the Board."

CONCLUSION.

For the reasons above stated, petitioner respectfully submits that the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS,
For the District of Columbia Circuit.

No. 12891.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, Petitioner,

v.

National Labor Relations Board, Respondent,
Swift & Company, Intervenor.

No. 12931.

Swift & Company, a Corporation, Petitioner

v.

National Labor Relations Board, Respondent,
Amalgamated Meat Cutters and Butchers Workmen of North America, AFL, Local 88, Intervenor.

On Petition to Review and Set Aside and on Request for Enforcement of an Order of the National Labor Relations Board (No. 12891) and On Petition to Review and to Amplify the Same Order of the Board (No. 12931).

Decided June 22, 1956.

Mr. Mozart G. Ratner, of the bar of the Supreme Court of Illinois, pro hac vice, by special leave of Court, with

whom Messrs. Martin F. O'Donoghue and Thomas X. Dunn were on the briefs, for Petitioner in No. 12891 and intervenor in No. 12931.

Mr. G. Carroll Stribling, with whom Mr. Earl G. Spiker was on the briefs, for intervenor in No. 12891 and petitioner in No. 12931.

Mr. Duane Beeson, Attorney, National Labor Relations Board, of the bar of the Supreme Court of California, pro hac vice, by special leave of Court, with whom Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, was on the brief, for respondent. Mr. Winthrop A. Johns, Counsel National Labor Relations Board, also entered an appearance for respondent.

Before Fahy, Washington and Danaher, Circuit Judges.

Fahy, Circuit Judge: The major issue in these appeals is whether the National Labor Relations Board erred in ordering the Amalgamated Meat Cutters & Butcher Workmen of North America, Local 88, hereinafter called the Union, to cease and desist from certain practices found by the Board to violate section 8 (b) (4) (A).[1] the

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[1] 61 Stat. 140-41 (1947), 29 U. S. C., § 158 (b) (4) (A) (1952). The section reads as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *."

"secondary boycott" provision of the National Labor Relations Act. A subsidiary question is whether this court should declare that the Board's order also applies to certain other activities of the Union.

The Union's membership is principally composed of persons engaged in the wholesale and retail distribution of meat and meat products in St. Louis, Missouri. These cases arose out of attempts of the Union to organize the salesmen employed by Swift & Company to sell meat at wholesale to retail stores in the St. Louis area. On September 10, 1953, the Union began picketing Swift's St. Louis Independent Packing Company plant. The very next day, however, Swift secured an order from a state court which enjoined all further picketing. The Union then turned to the tactics which became the subject of the proceedings before the Board.

The Union's membership included many persons who were responsible for buying meat at wholesale for retail stores or markets, terms we use interchangeably. Some of these were the owners of the stores themselves, while others were employees to whom owners or managers had delegated purchasing authority. The Union called upon these members to aid in its organizational drive by refusing to purchase from the Swift salesmen unless the latter joined the Union. This request was made at Union meetings, in Union literature mailed to its members, and by personal appeals to the buyers by Union representatives who visited the markets. Because of the Union's plea for support a number of Union members curtailed their purchases from Swift salesmen or ceased purchases altogether. The Secretary-Treasurer of the Union also told the members that if their employers "insisted" on buying Swift products, they should "sell it and display it," but the record discloses only one instance where an owner overruled a buyer. In the other instances where the owners or managers were informed of a buyer's refusal

to patronize the Swift salesmen they were unwilling to interfere, sometimes indicating a fear of Union reprisals.

A majority of the Board found that the Union had violated section 8(b) (4) (A) when its representatives called at the meat markets and there induced buyers who were employees of the market owners to refuse on behalf of their employers to buy Swift products from Swift salesmen, with an object of forcing or requiring the employers to cease handling Swift products and doing business with Swift salesmen.[2] The Board's order requires the Union to cease and desist from this type of activity. The Board declined, however, to pass on the legality of the Union's conduct "within its own organization," that is, the appeals at Union meetings and in Union literature.

In No. 12,891 the Union petitions us to set aside the Board's order, contending that the finding of a section 8(b) (4) (A) violation is not supported by the evidence and cannot be squared with either the language or the intent of that section. In its answer to this petition the Board requests the enforcement of its order. On the other hand, Swift, the petitioner in No. 12931, asks the court to clarify the Board's order by declaring that it covers the Union's activities "within its own organization."

The Union says, in the first place, that its appeals were not addressed to "employees," because the buyers were performing a managerial function and hence were acting as agents of their employers. Reliance is placed upon section 2(2) of the Act,[3] which defines the term "employer" to include "any person acting as an agent

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[2] The dissenting member agreed with the Trial Examiner, who had exonerated the Union.

[3] 61 Stat. 137 (1947), 29 U. S. C. § 152(2) (1952), amending 49 Stat. 450 (1935).

of an employer." The applicable definition, however, is that of "employee" in section 2(3),[4] since section 8(b)(4)(A) prohibits the inducement of "employees." That term is defined as including "any employee" with certain specific exceptions, such as supervisors. There is no broad exception for agents of employers, and the Union does not contend that the buyers fall within any of the specific exceptions. Consequently we think that the buyers are "employees" within the meaning of section 8(b)(4)(A), and the fact that they may also be agents of employers does not eliminate them from the scope of that section. The policy of the Act does not require a departure here from the ordinary meaning of the statutory language. See **Phelps-Dodge Corp. v. NLRB**, 313 U. S. 177, 191; **NLRB v. Armour & Co.**, 154 F. 2d 570, 574, cert. denied, 329 U. S. 732.

The Union says that its appeals were directed at only one employee of each employer, while the section 8(b)(4)(A) proscription is limited to the inducement or encouragement of "employees" of any employer. This provision, however, must be read in conjunction with the following general rule of statutory construction embodied in 61 Stat. 633 (1947), as amended, 1 U. S. C., § 1 (1952):

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> "words importing the singular include and apply to several persons, parties, or things;
>
> "words importing the plural include the singular; * * *."

Application of this rule to the instant case seems "necessary to carry out the evident intent of the statute." **First National Bank v. Missouri**, 263 U. S. 640, 657. The

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[4] 61 Stat. 137-38 (1947), 29 U. S. C. § 152(3) (1952), amending 49 Stat. 450 (1935).

effect of the Union's activity is the same in this case, where many employees of various employers are involved, as it is where many employees of a single employer are involved. Congress must have intended section 8 (b) (4) (A) to apply to this type of situation.[5]

A related argument of the Union is that it did not induce or encourage "concerted" activity by the buyers. It relies on **NLRB v. International Rice Milling Co.**, 341 U. S. 665, where the Supreme Court held that the actions of pickets in seeking to persuade two employees of a neutral employer not to cross a primary picket line were not violations of section 8 (b) (4) because there was no inducement to concerted conduct. The Court stated:

> "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8 (b) (4) and they do not here." Id. at 671.

The Court considered the case to involve merely an individual solicitation directed at an employee to make his own determination not to cross the picket line. In the instant case, however, the appeals were to the employees as members of a group, encouraged parallel action, and were not incidental to primary picketing. It would be artificial to say that the Union did not encourage a unity of effort, and therefore concerted action, on the part of the employees. We think this type of inducement is designed to secure concerted conduct and does not fall within the scope of the **Rice Milling** decision. Cf. **Piezonki**

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[5] If the dicta in Joliet Contractors Association v. NLRB, 202 F. 2d 606, 612 (7th Cir.), cert. denied, 346 U. S. 824, is contrary to our conclusion, we find ourselves unable to agree.

v. **NLRB**, 219 F. 2d 879, 883 (4th Cir.); **NLRB v. Denver Bldg. Council**, 193 F. 2d 421, 424 (10th Cir.); **NLRB v. Service Trade Chauffeurs**, 191 F. 2d 65, 67 (2d Cir.); **Schauffler v. United Association of Journeymen**, 230 F. 2d 572, 574 (3d Cir.). See, also, Comment, 50 Mich. L. Rev. 315, 326-30; Note, 62 Yale L. J. 1111, 1120-22.

The Union next argues that it did not induce the buyers to "refuse" to purchase from the Swift salesmen, because a "refusal" within the meaning of section 8 (b) (4) (A) implies action contrary to the express or implied orders of the neutral employer. But the employees did refuse in the ordinary sense of that word. The law is in a state of some confusion with regard to whether this statutory term should be given its ordinary meaning. See, e. g., **Sand Door & Plywood Co.**, 113 NLRB No. 123; **Pittsburgh Plate Glass Co.** 105 NLRB 740; **Rabouin d/b/a Conway's Express**, 87 NLRB 972, aff'd sub nom. **Rabouin v. NLRB**, 195 F. 2d 906 (2d Cir.); Note, 64 Yale L. J. 1201. We do not feel called upon to decide this issue. The Board found, with ample support in the evidence, that the "discretion vested in the buyers by their employers was one to be exercised solely in the employer's interest and was not a discretion to accomplish some ulterior aim of the buyers themselves." The Board concluded, "It seems plain that the Union here induced employees to refuse to perform or to refrain from performing for their employers a service they had theretofore performed, i. e., to determine solely on the basis of objective criteria whether the purchase of Swift products was in the interest of their employer." The Board's delineation of the employees' duties as agents of their employers is supported not only by the evidence but by the general law of agency. See **Restatement of Agency** §§ 387, 424 (1933). It is clear from the Board's findings that the Union appealed to the employees to abuse the discretion delegated to them, for it asked them to cut off purchases because of the Union's

interests regardless of whether such action might or might not be advantageous to their employer. Their accession to such appeals constituted a "refusal."[6]

The Union also contends that since buying is not one of the services specifically enumerated in section 8 (b) (4), nor similar to those which are listed, it does not fall within the reach of that section. The section's proscription applies to inducements not "to use, manufacture, process, transport, or otherwise handle or work on any goods * * * or to perform any services." The Union's ejusdem generis argument is that the activities specifically enumerated are usually performed by employees whereas buying is generally handled by owners or supervisors. But in the context of this case buying clearly is one of the "services" the employees are required "to perform." The principle of ejusdem generis "gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards." **United States v. Gilliland**, 312 U. S. 86, 93. Congress here provided "added safeguards" by inserting the "alternative provisions" "otherwise handle or work on any goods * * * or to perform any services," so that the section would cover employee activity reasonably calculated to produce the results which Congress wished to prevent.

The Union's final statutory argument is that the Board erred in finding that the "object" of the boycott was "forcing or requiring" any market owner to cease doing business with Swift. The Union contends that its real

[6] A Union argument closely allied to the one just discussed is that there was no inducement of action on the part of the employees "in the course of their employment," because they were not required by the terms of their employment to continue purchasing from Swift salesmen. But, as has been seen, they were obliged not to cease this purchasing simply because of the interests of the Union. Moreover, a function of most of the buyers was to determine with whom orders should be placed, and consequently the making of the decisions here involved was plainly in the course of their employment.

object was to persuade the Swift salesmen to join the Union. True, no doubt, this was the ultimate object, but that does not insulate the Union's actions where the Board finds on sufficient evidence, as here, that such ultimate object is sought by prohibited means. A finding of an illegal intermediate object is all that is required. "It is not necessary to find that the **sole** object of the strike was that of forcing the contractor to terminate the subcontractor's contract." **NLRB v. Denver Bldg. Council**, 341 U. S. 675, 689. The Union argues, however, that in any event it cannot be said that an object of the refusal to purchase was "forcing or requiring" the cessation of business between any market owner and Swift, because "once the buyers ceased purchasing, business relations between the markets and Swift were automatically terminated and no action by the market owner was required or even contemplated." We cannot accept such a narrow definition of terms, for it is not consonant with the intent of the statute and is not necessitated by its language. No pressure could have been more successful in "requiring" the market owners to cease purchasing from Swift salesmen than the means here employed.

Apart from these statutory arguments the Union contends that the evidence is insufficient to support the finding that there was inducement of "employees." There was no direct evidence that any of the buyers contacted by Union representatives at the markets were employees. The Union argues that such evidence is required in this case because some of the Union's members were market owners or supervisors. But a finding of the Board need not necessarily be supported by direct evidence. See **Radio Officers v. NLRB**, 347 U. S. 17, 48-49; **NLRB v. Link-Belt Co.**, 311 U. S. 584, 602. We think that the finding in question is sufficiently sustained by circumstantial evidence, especially in light of the failure of the Union to undertake to establish, as it had ample opportunity to do,

that none of the buyers solicited were employees. The record shows that the majority of the Union's members were employees within the meaning of section 8 (b) (4), and that the Union's business representative admitted he was "almost constantly calling on * * * [Union] members in the shops and urging them to buy only from union salesmen." In view of these considerations, we think the Board was justified in concluding that "at least some" of the Union members appealed to were employees.

The final argument of the Union is that even conceding the boycott technically falls within the terms of the statute, the circumstances of this case make the boycott "primary" rather than "secondary"; and since section 8 (b) (4) was intended to ban only secondary action, the Board's order must be vacated. We will assume that this interpretation of the statute is correct. See **NLRB v. Denver Bldg. Council,** supra, at 686, 692; **Di Giorgio Fruit Corp. v. NLRB,** 89 U. S. App. D. C. 155, 162, 191 F. 2d 642, 649, cert. denied, 342 U. S. 869; Comment, 50 Mich. L. Rev. 315. We cannot agree, however, with the Union's characterization of its activity. It contends that the boycott was primary for two reasons. In the first place, it says, "Refusal to patronize one's adversaries in a labor dispute is the classic 'primary boycott.'" But this was not a consumer boycott. Here the appeals to the buyers were not designed simply to induce them to withdraw their personal patronage from Swift, but rather were meant to move them to stop purchasing on behalf of their employers and thus to cause a cessation of business between the employers and the Swift salesmen. This type of union activity falls squarely within the intent of the statute. But, the Union further maintains, its appeals encouraged action by the buyers at the primary situs of the dispute and therefore were not illegal, though that situs was also a neutral employer's place of business. The Union cites a number of "common situs" cases, including **Moore Dry**

Dock Co., 92 NLRB 547; **Sales Drivers v. NLRB**, ... U. S. App. D. C. ..., 229 F. 2d 514, cert. denied, ... U. S. ...; **NLRB v. Chauffeurs, Teamsters**, 212 F. 2d 216 (7th Cir.); and **NLRB v. Service Trade Chauffeurs**, 191 F. 2d 65 (2d Cir.). The direct appeals here made to the employees of neutral employers, however, can hardly be classed with the "incidental effect" upon such employees which we stated in **Sales Drivers v. NLRB**, supra, might in some circumstances be a permissible by-product of picketing directed against the primary employer. See, also, **Piezonki v. NLRB**, 219 F. 2d 879, 882-83 (4th Cir.); **NLRB v. Service Trade Chauffeurs**, 191 F. 2d 65, 67 (2d Cir.). We agree with the Board's disposition of this issue. It stated:

> "The 'roving situs' decisions upon which the Respondent [Union] relies are inapposite here. Where picketing is involved, or other forms of inducement directly aimed at employees sought to be organized, the Board must, and does, recognize a certain degree of inevitable inducement of the employees of neutrals. In the absence of conduct directly aimed at the primary employees, however, there is no question of incidental as distinguished from direct inducement. Here the principal inducement shown was a direct appeal, on the very premises of neutral employers, to the latter's employees to refrain from performing one of their assigned tasks."

Since we hold that the Board did not err in finding that the Union's activities at the meat markets constituted violations of section 8 (b) (4) (A), we will enforce the Board's order insofar as it prohibits such inducements and any similar ones occurring at the markets. Swift asks us to go further and declare that the order also proscribes the appeals made at Union meetings and through its bulletins. Swift contends that the evidence clearly proves these inducements to be illegal. Hence, the argument goes,

they are covered by the order, phrased in the broad terms of the statute, and this court should so declare so as to clear up the ambiguity engendered by the Board's refusal to decide whether these activities violated the statute. We agree that there is ambiguity, but we do not feel free to dispel it in the manner requested by Swift. No doubt the Board may fashion an order so that it not only prohibits the actions specifically found to be illegal but also activities of a somewhat different nature which might be resorted to in an attempt to circumvent the Board's decision. See **Electrical Workers v. NLRB**, 341 U. S. 694, 705-706; **American Newspaper Publishers Ass'n v. NLRB**, 193 F. 2d 782, 799 (7th Cir.); **Evans v. International Typographical Union**, 81 F. Supp. 675, 678 (S. D. Ind.). Here, however, not only did the Board specifically refuse to pass upon the legality of the appeals made at the Union's meetings and through its literature, but a prior Board decision, **Western, Inc.**, 93 NLRB 336, raises considerable doubt whether the Board would consider these appeals to be violations of section 8 (b) (4) (A). In these circumstances we cannot interpret the Board's order to apply to such activities. We agree with the Union's contention that on the findings made by the Board its order, broad in terms, is not to be construed as prohibiting the activities at Union meetings or through the mailing of literature, the validity of which the Board declined to decide.

The order of the Board, as interpreted by this opinion, will be enforced.

It is so ordered.

APPENDIX B.

United States Court of Appeals
For the District of Columbia Circuit.

No. 12891

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, Petitioner

v.

National Labor Relations Board, Respondent, Swift & Company, Intervenor

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No. 12931

Swift & Company, a Corporation, Petitioner

v.

National Labor Relations Board, Respondent Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, Intervenor

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On Petitions for Rehearing

Decided September 13, 1956

Before Fahy, Washington and Danaher, Circuit Judges.

Per Curiam: In a petition for rehearing the Union urges that our treatment of the meaning of "employees" to include the buyers, though they might also have been agents of the employers, is both erroneous and inconsistent with the Board's uniform interpretation of the term "employees," as recently exemplified by the following state-

ment of the Board in **Swift & Co.**, 115 NLRB No. 105, decided March 9, 1956:

> "It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management.[2] Such individuals cannot be deemed to be employees for the purposes of the act.

This is the latest of a series of decisions in which the Board has excluded from employee bargaining units persons whose interests were found to be so closely allied with those of the employer that they should be considered representatives of management rather than "employees." Our opinion, therefore, was too broadly phrased. Nevertheless we are of the view that the buyers in the present case were so identified with employee and Union activity as to be within the statutory meaning of "employees" for purposes of section 8 (b) (4) (A). The Union contends that even if such identification would bring them within the meaning of "employees" in a representation proceeding, the crucial issue here is whether the buyers were approached by the Union in their capacity as representatives of management or as employees. Assuming this to be a proper statement of the issue the outcome remains the same, for the Board treated the inducement or encouragement as directed to the buyers as employees, with ample support in the record.

In Swift's petition for rehearing we are again urged to hold that the Board erred in refusing to pass upon the legality of the appeals made at the Union's meetings, or to remand to the Board to require it to decide this issue. Under the circumstances here presented we do not think the statute made such a decision mandatory upon the Board, or that we are required to remand the case for such a decision by the Board.

The petitions for rehearing are denied.

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[2] See Section 2 (2) and (3) of the Act, * * *."

APPENDIX C.

Title 28, United States Code, Section 1254 (1), excerpt:

"§ 1254. Courts of appeals; certiorari; appeal; certified questions.

"Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * * * * *"

Title 28, United States Code, Section 2101 (c), excerpt:

"§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 61 Stat. 136, Title 29, United States Code, Section 151 et seq.

Section 7 of the Act (29 U. S. C., Section 157):

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also

have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 8 (b) (4) (A) of the Act (29 U. S. C., Section 158 (b) (4) (A), excerpt:

"Section 8:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *"

Section 10 (a) of the Act [29 U. S. C., Section 160 (a)]:

"Section 10 (a)

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: **Provided,** That the Board is empowered by agreement with any agency of any State or Territory

to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Section 10 (b) of the Act [29 U. S. C., Section 160 (b)]:

"Section 10 (b)

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: **Provided,** That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer

to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

Section 10 (c) of the Act [29 U. S. C., Section 160 (c)] excerpt:

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *"

Section 10 (d) of the Act [29 U. S. C., Section 160 (d)]:

"Section 10 (d)

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

Section 10 (e) of the Act [29 U. S. C., Section 160 (e)], excerpt:

"Section 10 (e)

"(e) The Board shall have power to petition any United States court of appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * *"

Section 10 (f) of the Act [29 U. S. C., Section 160 (f)]:

"Section 10 (f)

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein

the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit.
April Term, 1956.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88,
Petitioner,
v.
National Labor Relations Board,
Respondent,
Swift & Company,
Intervenor.
No. 12,891.

Swift & Company, a Corporation,
Petitioner,
v.
National Labor Relations Board,
Respondent,
Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88,
Intervenor.
No. 12,931.

(United States Court of Appeals for the District of Columbia Circuit. Filed, Jun 22, 1956, Joseph W. Stewart, Clerk.)

On Petition to Review and Set Aside and on Request for Enforcement of an Order of the National Labor Relations Board (No. 12,891) and on Petition to Review and to Amplify the Same Order of the Board (No. 12,931).

Before: Fahy, Washington and Danaher Circuit Judges.

Judgment.

These cases came on to be heard on the record from the National Labor Relations Board and on (1) a petition to review and set aside an order of the National Labor Relations Board (No. 12,891); (2) on the request of the Board for enforcement of said order (No. 12,891); and (3) on a petition to review and to amplify said order of the Board (No. 12,931); and said cases were argued by counsel.

On Consideration Whereof, it is ordered by this Court that the order of the National Labor Relations Board on review in these cases, as interpreted by the opinion of this Court, shall be enforced.

Pursuant to Rule 38 (1) of this Court, the respondent shall within 10 days hereof serve and file a proposed enforcement decree.

Dated: June 22, 1956.

Per Circuit Judge Fahy.

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, Petitioner, v. National Labor Relations Board, Respondent, Swift and Company, a Corporation, Intervenor.	No. 12,891.
Swift and Company, a Corporation, Petitioner, v. National Labor Relations Board, Respondent, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, Intervenor.	No. 12,931.

Decree Enforcing an Order of the National Labor Relations Board.

(United States Court of Appeals for the District of Columbia Circuit. Filed Jul. 23, 1956, Joseph W. Stewart, Clerk.)

Before: Fahy, Washington and Danaher, Circuit Judges:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated

July 26, 1955. The Court heard argument of respective counsel on March 14, 1956, and on June 22, 1956, being fully advised in the premises, handed down its decision enforcing the order of the Board as interpreted by the Court's opinion. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed by the Court that Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local No. 88 (hereinafter called the Union), St. Louis, Missouri, and its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from inducing or encouraging the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is forcing or requiring any employer or person other than Swift and Company to cease handling the products of Swift and Company or doing business with its salesmen.

2. Take the following affirmative action, which the National Labor Relations Board has found will effectuate the policies of the National Labor Relations Act, as amended (hereinafter called the Act):

(a) Post at its business offices and meeting halls in the St. Louis, Missouri, area, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Fourteenth Region of the National Labor Relations Board, St. Louis, Missouri, shall, after being duly signed by the Union be posted by the Union immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said

notices are not altered, defaced, or covered by any other material.

(b) Mail to the aforesaid Regional Director signed copies of the said notice for posting at Swift and Company's St. Louis, Missouri, plant, Swift and Company willing, at places where notices to its salesmen or other employees are customarily posted.

(c) Notify the said Regional Diector in writing, within ten (10) days from the date of this Decree, what steps the Union has taken to comply herewith.

/s/ Charles Fahy,
Judge, United States Court of Appeals
for the District of Columbia Circuit.

/s/ George T. Washington,
Judge, United States Court of Appeals
for the District of Columbia Circuit.

/s/ John A. Danaher,
Judge, United States Court of Appeals
for the District of Columbia Circuit.

APPENDIX.

Notice to Members.

Pursuant to

A decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

WE WILL NOT induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manu-

facture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is forcing or requiring any employer or person other than Swift and Company to cease handling the products of Swift and Company or doing business with its salesmen.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local No. 88.

(Labor Organization)

Dated .....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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JOHN T. FEY, Clerk

No. 677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL, LOCAL 88,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

SWIFT & COMPANY,
Intervenor.

No. 624

SWIFT & COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL, LOCAL 88,
Intervenor.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Oakes, Organized Labor and Industrial Conflicts (1927) 28

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SWIFT & COMPANY, A CORPORATION,
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Respondent.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL, LOCAL 88,
Intervenor.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, hereinafter called the

Union, prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the District of Columbia Circuit enforcing an order issued against petitioner by the National Labor Relations Board. Swift & Company, upon whose charge the Board's complaint was issued, has filed a petition for certiorari, No. 624, this Term, to review the judgment of the court below insofar as it refuses to expand the prohibitory sweep of the Board's order against the Union. Although both petitions arise out of the same order and judgment, and the Union has, therefore, filed a cross petition for certiorari, its request for review is in no way dependent upon the action of this Court in granting or denying review in No. 624.

CITATIONS TO OPINIONS BELOW.

The opinion of the majority of the Board (R. 186-194), the dissenting opinion of Member Murdock (R. 194-205), and the Intermediate Report of the Trial Examiner (R. 157-186) are reported at 113 NLRB 275.[1] The initial opinion of the court below is reported at 237 F. 2d 20 (Appendix B, *infra*, pp. 35-46), and its opinion on rehearing is reported at 237 F. 2d 27 (Appendix C, *infra*, pp. 47-48). The Union's second petition for rehearing and its petition for rehearing *en banc* (R.II 54-60), were considered on the merits and denied without further opinion (R.II 62, 63).

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1. The record consists of the Joint Appendix filed in the court below, supplemented by the proceedings in that court which were designated by petitioner in No. 624 and by petitioner herein. The portions designated in No. 624 are paginated to succeed the pagination of the Joint Appendix. The portions designated by petitioner herein are separately paginated and are referred to by the symbol "R.II". References "R" are to the numbers at the top of the pages of the Joint Appendix.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, U. S. C., and under Section 10(f) of the National Labor Relations Act as amended, 61 Stat. 136, 29 U. S. C. Supp. V, Sec. 151, *et seq.*

The initial opinion and the judgment (R. 225-236a, 236b-236c), of the Court of Appeals were issued June 22, 1956 (Appendix D, *infra*), pp. 49-50. Its decree was entered on July 23, 1956 (R. 237, Appendix D, *infra*, pp. 51-54). The opinion on the Union's petition for rehearing (R. 256-257), was issued on September 13, 1956. On October 8, 1956, the court below entered its orders (R.II 62, 63), granting the Union's motions for leave to file a second petition for rehearing and a petition for rehearing *en banc*, and denying the petitions which had been filed.

QUESTIONS PRESENTED.

A labor organization induced each of its members who was empowered to purchase meat for the retail market at which he was employed to refrain from patronizing certain wholesale meat salesmen whom the Union was seeking to organize. The question presented is whether the Union thereby induced "*the employees of any employer* to engage in * * * a *concerted refusal in the course of their employment* * * * to perform any *services*, where an object thereof is: *forcing* or *requiring* any employer * * * to cease doing business with any other person." Resolution turns on the following subsidiary questions:

1. Is the exercise of discretion on behalf of an employer to determine with whom the employer will do business a "service" performed by "employees" "in the course of their employment" within the meaning of Section 8(b)(4)(A).

2. Is the word "employees" as it appears in the context of Section 8(b)(4)(A) to be read as if alternatively it had been written "employee".

3. Is the refusal of various buyers, each employed by a different employer, to patronize a particular company's salesmen whenever such a salesman happens to call upon a buyer for an order "concerted", as distinguished from "individual", action within the meaning of Section 8(b)(4)(A).

4. As used in Section 8(b)(4)(A) does the term "refusal" comprehend non-performance of a service where the employer of the employees involved consents to and acquiesces in the non-performance and where the employees are at all times willing to perform the service if their employer instructs them to do so.

5. Is the object forbidden by Section 8(b)(4)(A) the "causing" of a neutral employer to "cease doing business" with a primary employer or the "forcing or requiring" of a neutral employer to cease.

6. If all of the foregoing questions are answered adversely to petitioner, or in the alternative, is Section 8(b)(4)(A) to be construed as outlawing the exertion of direct economic pressure upon an offending employer in a labor dispute by employees of a neutral employer at the primary situs of the dispute, if a consequence of such action is to force the neutral employer to cease doing business with the offending employer.

STATUTE INVOLVED.

The sections of the National Labor Relations Act, 61 Stat. 136, 29 U. S. C. § 151, *et seq.*, involved are printed in Appendix A, *infra*, pp. 31-32. Also affected is Section 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, 29 U. S. C. § 187, pp. 32-33, *infra*.

STATEMENT.

A. The Subsidiary Findings.[2]

Swift & Company, at its St. Louis Independent Packing Company plant, employs salesmen to sell meat at wholesale to retail stores in the St. Louis area (p. 37, *infra*). These salesmen solicit orders either by calling at the retail stores in person, or by telephoning to its buyer (R. 187, 161).

The Union's membership is composed of persons engaged in the wholesale and retail distribution of meat and meat products in St. Louis, Missouri (p. 37, *infra*). Its membership includes the buyers who purchase meat for the retail markets (p. 37, *infra*), and also includes the wholesale salesmen employed by meat packers other than Swift in the St. Louis area (R. 187, 188; 81-82, 107, 135).

The instant case arose out of the Union's attempts to organize Swift's salesmen (p. 37, *infra*). On September 10, 1953, the Union began picketing Swift's plant (p. 37, *infra*, R. 161-162, 134).[3] The very next day Swift secured an

2. Except as otherwise specifically stated, the facts set forth herein are those found by the Court of Appeals and the majority of the Board, which adopted all findings of the Trial Examiner which were "consistent" with its decision (R. 187). Where supplementary underlying evidence is referred to, the statement so indicates.

3. On charges filed by Swift alleging that the picketing violated Section 8(b)(1)(A) of the Act, the General Counsel decided that the picketing was organizational only and was not designed or intended to force Swift to force the salesmen to join the Union, and therefore refused to issue a complaint against it (R. 162, 139-140). The statement in the petition in No. 624, p. 5, that the Union "made no efforts to persuade such salesmen to join the union through normal direct means", and its characterization of the organizational efforts made by the buyer-members as "indirect" are inaccurate (R. 17, 46-47, 50-52; cf. *Garner* v. *Teamster's Union*, 348 U. S. 485), and, in any event, entirely irrelevant to the questions of construction of Section 8(b)(4)(A) which are here involved. (Cf. the organizational picketing and the violence

order from a state court which enjoined all further picketing (p. 37, *infra*).[4] The Union then appealed for aid in its organizational drive to those retail buyers from whom Swift's salesmen solicited orders (*ibid*).[5]

Those buyers whose aid the Board and the court below found it unlawful for the Union to seek to enlist (R. 187-188) are each employed by a different employer (pp. 39-40, *infra*, R. 184, 191, note 7).[6] To each one their employer had

issue in *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665.) The same principles of law which determine whether the Union's inducement violated Section 8(b)(4)(A) would apply if Swift's salesmen had been members of the Union, had gone on strike for a lawful purpose, had been replaced by Swift with other salesmen, and the Union had then asked the buyers to support the strikers by not patronizing their non-union replacements. 93 Cong. Rec. 4198.

4. Long afterwards the Board applied to the United States District Court for the Eastern District of Missouri (R. 102-105), for an order enjoining Swift from enforcing this injunction, on the ground that the injunction invaded the federally-occupied field and prohibited peaceful picketing which the national Act did not illegalize (R. 104-105). *NLRB* v. *Swift & Co.*, 130 F. Supp. 214. The district court denied that relief, and the Court of Appeals affirmed on jurisdictional grounds, citing *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U. S. 511. *NLRB* v. *Swift & Co.*, 233 F. 2d 226 (C. A. 8). The Board in its opinion herein assumed that Swift's state court injunction was illegal (R. 190, n. 6).

5. The instant case does not involve buyers for retail chain stores, for the salesmen involved had no contact with them (R. 187, 170, 173, 184; 106, 30b). Nor does it involve any buyer who had not been vested by his employer with full discretion "to determine with whom orders should be placed", for the only violation found was inducement of the buyers to abuse their discretionary authority in placing orders (pp. 41-42, note 6, *infra*, R. 187-188, 189, 191-192).

6. The buying function is vested in only one person during any given period of time (R. 191, n. 7, 204, 184). In some stores the owner or manager or a supervisor does the buying (p. 37, *infra*). Insofar as they were addressed to such persons, the Union's appeals were, of course, not held illegal, because employers and **supervisors are excluded, by definition, from the category of "employees" and no union inducement can be brought within the scope of Section 8(b)(4)(A) unless it is directed to "employees"**, as that term is used in the Act (pp. 38-39, 47-48, *infra*).

"delegated purchasing authority" (p. 37, *infra*), which included "full discretion as to the amount and sources of the purchases" (R. 184-185, 191-192; 92, 93-94, 24, 25, 70). In deciding "with whom orders should be placed" (p. 42, note 6, *infra*), the buyers were "acting as agents of the employers" (pp. 38, 39, 41, *infra*), and "were performing a managerial function" (p. 39, *infra*).

The Union called upon these buyers "to aid in its organizational drive by refusing to purchase from the Swift salesmen unless the latter joined the Union" (p. 37, *infra*). At the same time, the Union made it clear that if any market owner desired to obtain meat for his market from Swift despite the boycott, the buyer should proceed to purchase it (R. 163, 166, 191-192; 36, 107, 118). The Union's request was made at Union meetings, in Union literature mailed to its members, and in person to the buyers by Union representatives when they visited the markets (p. 37, *infra*).[7]

Because of the Union's plea for support, a number of buyers, with the "acquiescence and consent" of their employers (R. 181, 184), curtailed their purchases from Swift salesmen or ceased purchases altogether (p. 37, *infra*, R. 191-192; 163-164). The Board found (R. 184-185), that the market owners did not "choose to require" their buyers to buy from Swift; that no market owner "objected to following the Union's policy regarding purchases" (R. 164), and that "not one single owner objected to the decision to cease purchasing from Swift" (R. 181). The evidence showed that in some instances Swift's salesmen appealed

7. The record contains no evidence of any conversation in any retail market relating to the subject of purchasing from Swift salesmen between a union representative and any buyer who was an "employee" within the meaning of Section 2(3) of the Act (pp. 43-44, *infra*). The Board and the court below nevertheless "inferred" that such conversations must have taken place (*ibid;* R. 191). In view of *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502, petitioner does not seek review of this finding.

for an order directly to the market owner (R. 164). The market owners refused these requests, one saying that he would not go "over the head" of the buyer (R. 92), another that "the Union had done him a great many favors, he did not feel inclined to break their wishes" (R. 164; 76); and a third inquiring of the salesman why he did not join the Union (R. 84).[8] In only one instance did a Swift salesman succeed, after a time, in inducing a market owner to resume purchasing (R. 163-164, 191; 22, 26-27). In that instance, as the Board specifically found, once the owner decided to purchase from Swift, "the buyer did so pursuant to Union instructions" (R. 191, cf. p. 37, *infra*).

In addition to performing the purchasing function, the buyers here involved also cut, wrap, display and sell meat (R. 168). The latter duties occupy a majority of their time. The Board found (R. 168-169), however, that throughout the period involved the buyers continued to use, handle and sell Swift products after they had been purchased, and that the Union did not induce or encourage the buyers "to refuse to handle, use, sell, work on, *etc.* — as distinguished from buy — Swift products. • • • inducement and encouragement was strictly limited to refusing to buy" (R. 169-170).

B. The Legal Conclusions.

A majority of the Board and the court below concluded that by appealing to the buyers, as members of the Union, to refrain from purchasing from Swift's salesmen until the salesmen joined the Union, the Union induced the buy-

8. That statements made by market owners to Swift salesmen sometimes indicated "a fear of Union reprisals" (p. 38, *infra*; cf. R. 164), could not possibly support an inference that the Union made any threats to any store owner to procure his consent. The Trial Examiner found that in fact no threats had been made (R. 164-168) and neither the Board nor the court below reversed his finding. Cf. pp. 22-23, *infra*.

ers to violate a fiduciary duty which, as agents, they owed to the respective market owners (pp. 41-42, 48, *infra*, R. 189, 191-192, n. 8). It was held to be the duty of the buyers to exercise their discretion in determining with whom orders should be placed "solely in the employer's interest * * * and not to accomplish some ulterior aim of the buyers themselves" (R. 192). Summarizing the Board's rationale, the court below stated (pp. 41-42, *infra*): "the Union appealed to the employees to abuse the discretion delegated to them, for it asked them to cut off purchases because of the Union's interests regardless of whether such action might or might not be advantageous to their employer". Finding that but for the Union's appeal the buyers would have continued to purchase from Swift's salesmen, a majority of the Board and the court below concluded that the Union, in violation of Section 8(b)(4)(A), had thereby induced "employees" to "refuse" to perform a "service" which they were required to perform "in the course of their employment" (pp. 41-42, note 6, *infra*, R. 189, 191-192). That conclusion rested on the following subsidiary determinations:

1. ***Although the purchasing function is a "management prerogative", and the buyers act in its performance in the capacity of "agents" rather than "employees" of the market owners, it is a "service" within the meaning of Section 8(b)(4)(A).***

At all times before the Board and the court below petitioner urged that because determining with whom an employer should do business has always been recognized by the Board to be a "management prerogative", and because, where that function is delegated, the delegatee acts, *pro tanto*, as an "agent" of the owner and hence as an "employer" within the meaning of Section 2(2), not as a mere "employee" within the meaning of Section 2(3), the

duty of deciding from to patronize cannot be treated as a "service" which "employees" are required to perform "in the course of their employment" within the meaning of Section 8(b)(4)(A). The trial examiner and dissenting member Murdock so held (R. 176-183, 202-204).

The Board majority did not deny that the exercise of discretion in selecting among would be suppliers is a "management prerogative". Indeed, shortly after its decision herein it reaffirmed in *Swift & Co.*, 115 NLRB 752, 753-754, that employees who are empowered to make "purchases of produce" for their employer, even though they are vested with less discretion than are the buyers in this case, *pro tanto* "exercise a managerial prerogative" (R.II 4-6). Nor did it deny that in performing that function the buyers in this case acted as agents of their employers within the meaning of Section 2(2). It rejected petitioner's contention solely because it found "no support in the legislative history of the Act for such a restrictive interpretation of the meaning of Section 8(b)(4)(A)." (R. 189.)

Initially, the court below held it irrelevant that the purchasing function is "managerial" and that in performing it the buyers act as "agents", on the theory that the term "employee" as used in Section 8(b)(4)(A) includes agents of the employer, as well as employees. On the premise that, consistent with the statutory scheme, one could be performing a given function both as an "agent" and as an "employee", the court concluded that although the discretionary purchasing function is a "managerial prerogative" it is also an "employee activity", and, as such, comprehended by the term "services" in Section 8(b)(4)(A) (p. 39, *infra*).

In its opinion on rehearing the court acknowledged that Congress intended to and had distinguished between duties and services which are performed in the capacity of

"employee" and duties and services which are performed in the capacity of "employer" or "agent" of an "employer" (pp. 47-48).[9] However, the court stated the question to be "whether the buyers were approached by the Union in their capacity as representatives of management or as employees". Finding that the buyers were closely "identified with employee and Union activity" and that the Union appealed to them as Union members, the court concluded that the Board had properly treated "the inducement or encouragement as directed to the buyers as employees." The impact of its acknowledgment of the dichotomy between functions performed as "agents" and functions performed as "employees" upon its initial holding that the "management prerogative" of exercising discretion in purchasing is an "employee activity" and hence a "service" within the meaning of Section 8(b)(4)(A), the court did not discuss, although it did not alter its prior finding (p. 41, *infra*), that the only "service" which the Union induced the buyers not to perform was this one, which they performed "as agents of their employers".

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9. In its petition for rehearing (R.II 40-47), as in its earlier briefs, petitioner had detailed the legislative history of the Act which showed that Congress decided to eliminate entirely from the scope of the Act all relationships in which persons act as "agents" of their employer, as distinguished from relationships in which persons act as "employees". The legislative history (R.II 42) shows that to effectuate this purpose Congress adopted the common law definition which treats as an "agency" rather than as "employment" relationship the exercise of discretion in determining, on behalf of another, with whom contracts should be made or orders placed (See 2 C. J. S. Agency, § 2, p. 1029). The legislative history also shows that in excluding all agency relationships from the coverage of the Act Congress intended to reverse the rule of *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485. It regarded that rule as unduly restrictive of the power of the employer to cope with the potential vice of Union induced faithlessness in the performance of discretionary functions by persons upon whom the employer relies to act solely in his interest.

2. *As used in Section 8(b)(4)(A), the word "employees" is also to be read "employee".*

Both the majority of the Board (R. 191, n. 7) and the court below held that although the Union's inducement was directed only to "one employee of each employer" (p. 39, *infra*), it satisfied the requirement of Section 8(b)(4)(A) that, to be unlawful, Union inducement must be directed to "the employees of any employer", and must be designed to accomplish a "concerted refusal" by them. Invoking the general construction statute, 61 Stat. 663, 1 U. S. C. § 1, which provides that "unless the context indicates otherwise • • • words importing the plural include the singular", the court read the word "employees" as if it had been alternatively written "employee" (pp. 39-40, *infra*). The court rejected, *sub silentio*, the Union's contention that the juxtaposition of "employees" with "concerted refusal" precludes reading "employees" in the singular, because it takes at least two to make a concert. It similarly rejected the contention that if Congress had intended to reach the inducement of "concerted" action by individual employees, each employed by a different employer, it would have used only the word "employees" and not added the modifying phrase "of any employer". Section 2(3) flatly declares that the term "employee" "shall not be limited to employees of a particular employer, unless the Act explicitly states otherwise". Acknowledging that the Court of Appeals for the Seventh Circuit in *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606, 612, had interpreted this statutory language differently (p. 40, note 5, *infra*), the court concluded that because "the effect of the Union's activity is the same • • • where many employees of various employers are involved as it is where many employees of a single employer are involved", Congress "must have intended" Section 8(b)(4)(A) to apply to both situations (p. 40, *infra*).

3. *Refusal to purchase when a salesman approaches a buyer individually for an order is "concerted" rather than "individual" action within the meaning of Section 8(b)(4)(A).*

The court below, like the majority of the Board (R. 191, note 7), also rejected petitioner's contention that the Union induced individual, not concerted, conduct by the buyers when it asked each one to refrain, when a Swift salesman called on him for an order, from patronizing that salesman. The court said (p. 40, *infra*) that the inducement was "designed to secure concerted conduct", because it appealed to the buyers "as members of a group" and "encouraged parallel action" and "unity of effort" by them. The court distinguished *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, 671), where a picket line designed to induce every employee of a neutral employer who approached it to assist the Union by staying out of the plant was held to be aimed at procuring individual, not concerted, conduct by such employees, on the ground that in this case the Union's appeals "were not incidental to primary picketing."

4. *To refrain from performing a service is a "refusal" within the meaning of Section 8(b)(4)(A), even though the employer approves and acquiesces, and even though his employees are willing at all times to continue to perform the service if their employer instructs them to do so.*

The court below did not upset the findings, detailed above, pp. 7-8, that the Union instructed the buyers to purchase from Swift salesmen if the market owner instructed them to do so and that every buyer who ceased purchasing did so with the market owner's acquiescence and approval. It held, nevertheless, that because the Union asked the buyers to act in the Union's interest, rather than in the interest of their employer, it induced them to "refuse", in the statutory sense, to perform the

buying service which it was their duty to perform (pp. 41-42, *infra*). Petitioner had contended, at all stages of the proceedings, that the only "refusals" contemplated or reached by Section 8(b)(4)(A) are those which have as an "object" to "force or require" the employer of the employees involved to "cease doing business" with another person. Cessation of services which occurs with the employer's consent and acquiescence, and which, by the very terms of the inducement, is to resume whenever the employer desires to renew business dealings terminated by the cessation, cannot have the forbidden statutory object and therefore, petitioner argued, cannot come within the concept of 'refusal", as that term is used in Section 8(b)(4)(A). The court below, like the majority of the Board, refused to restrict the term "refusal" to acts of "concerted insubordination" (*Rabouin d/b/a Conway's Express*, 87 NLRB 972, 982, aff'd *sub nom. Rabouin* v. *NLRB*, 195 F. 906, 911-912 (C. A. 2), which are aimed at compelling an employer, against his will, to cease doing business with another.[10]

5. *Because the cessation of purchasing by the buyers terminated business relations between the retail markets and Swift, "an object" of its inducement was to "force or require" the market owners to cease doing business with Swift.*

Petitioner argued that although the object of its induce-

10 The opinion below declined to pass upon the further question whether, as the Board urged, even if the employer of the employees *explicitly consented in advance* to a union induced cessation of services the cessation would nevertheless be a "refusal" within the meaning of Section 8(b)(4)(A). We contend that wherever, as on the findings in this case, cessation is not designed to overcome the employer's will, it cannot be a "refusal" within the meaning of the statute. This question is basic to construction of the term "refusal". The "confusion" (p. 41, *infra*) created by application of the Board's new doctrine even to cases where the employer explicitly consents in advance will, in large measure, be dispelled by resolution of the issue presented in this case.

ment of the buyers was to cause them, on behalf of the markets, to cease patronizing Swift salesmen until those salesmen joined the Union, that object could not be within the statutory proscription because no market owner was, or was intended to be, "forced or required" to cease doing business with Swift by any buyer action taken pursuant to the Union's policy. Despite the fact that the only buyer who was instructed by his employer to resume purchasing did so, thereby following the Union's policy (*supra*, p. 8), the court below found the object of the Union's inducement of the buyers illegal because "No pressure could have been more successful in 'requiring' the market owners to cease purchasing from Swift salesmen than the means here employed" (p. 43, *infra*). The court held that petitioner's "definition of terms" was "narrow", "not necessitated" by the language of Section 8(b) (4) (A), and "not consonant with the intent of the statute." (*Ibid.*)

6. *Whether a boycott is "primary" and lawful, or "secondary" and unlawful, is to be determined not by the nexus between the employee action induced and the primary dispute, but solely by the geographic locale of the inducement.*

In prior decisions[11] the Board had held that where a labor organization at its meetings, or through bulletins addressed to its members and others at their homes, publicized its labor dispute with a "primary" employer, and thus appealed directly to employees of neutral employers for aid in that dispute, its conduct was "primary", *i. e.*, incidental to the primary dispute, and therefore lawful even if, in consequence, the employees thereafter refused in the course of their employment at places remote from the primary dispute to handle or work on goods received from or destined for shipment to the "primary" employer.

11. See e.g., *Western Inc.*, 93 NLRB 333, 337; *The Grauman Co.*, 87 NLRB 755, 756-757.

Under this doctrine, even though the conduct so induced was "secondary", *i. e.*, not directed immediately against the primary employer at a primary situs of the dispute, its inducement at places other than the neutral employer's premises was regarded as part of primary strike tactics.

The Board in this case, however, did not pass on the legality of the Union's appeals to the buyers insofar as they were made at union meetings or by mail to their homes (pp. 46, 48, *infra*, R. 190, 192). Presumably, it refrained because it was not prepared as yet to consider the impact of its new approach to the primary-secondary distinction (*infra*, pp. 23-28), upon appeals at Union meetings for action to be directed against the primary employer at the "primary situs" of the dispute. Such action was formerly held to be primary and its inducement lawful even though the appeals to engage in it were made on a neutral employer's premises, *infra*, pp. 24-25.

The Board held, however, that insofar as the Union made appeals "directly" to the buyers on the premises of the markets where they worked the appeals were *ipso facto* "secondary" and unlawful (R. 188, 190-191, 192, 206). Thus, the "directness" of the inducement rather than the nature of the action induced was held decisive in determining the Union's object, and the legality of "direct" inducement was made to turn entirely upon its locale. The court below stated that it agreed "with the Board's disposition of this issue" (p. 45, *infra*). As enforced, the order prohibits the Union from inducing the buyers to refrain from patronizing Swift salesmen, but only insofar as the inducement occurs on the premises of a retail market (p. 46, *infra*).

REASONS FOR GRANTING THE WRIT.

Of greater importance than any of the individual questions presented is the fact that this case exemplifies, and focuses in a variety of contexts, the basic conflicts in approach to the construction of Section 8(b)(4)(A) which have developed since this Court's decisions in *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, and companion cases. The conflicts in approach are these: (1) is the language which Congress chose to define the violation covered by Section 8(b)(4)(A) to be treated as words of limitation, or are those words to be disregarded where the Board or the courts believe that Congress must have intended to outlaw conduct to which the section as written does not extend; (2) is construction of Section 8(b)(4)(A) so as to outlaw all union activity which is designed to cause neutral employers to cease doing business with the primary employer consistent with "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 692.

I. The Statutory Language.

That the words of Section 8(b)(4)(A) are controlling is strongly suggested by the holding in *International Rice Milling*, *supra*, 341 U. S., at 670, that "The applicable proscriptions of §8(b)4 are expressly limited * * * ." The Court of Appeals for the Seventh Circuit adopted this ap-

proach in *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606, 612, cert. denied, 346 U. S. 824: "The [unlawful] objective must be accomplished by the specific means which the section defines and not otherwise." The Court of Appeals for the Second Circuit likewise adopted it in *Rabouin* v. *NLRB*, 195 F. 2d 906, 912 (C. A. 2), explaining: "in a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously." The court below, however, following the Board majority, substituted for the language of Section 8(b)(4)(A) its own views as to the scope of outlawry which Congress "must have intended" (pp. 39, 40, 42, 43, 44, *infra*).

(a) Although the term "services" is restricted by the language of Section 8(b)(4)(A) to those activities which are engaged in by "employees" "in the course of their employment", and therefore cannot comprehend such "managerial prerogatives" as determining with whom an employer should do business, the court below refused to give effect to this limitation. The reasons advanced—that the Union appealed to the buyers' loyalty as union members and that the buyers were closely identified with Union and employee activity—do not warrant the elision. In the first place, whether the buyers were violating their fiduciary duty to the market owners by refusing to patronize Swift salesmen cannot control determination of the statutory question, namely, whether in deciding with whom to do business the buyers were exercising a power vested in them as "agents" or as "employees." Section 2(13), which embodies the common law test, specifically provides

that "In determining whether any person is acting as an 'agent' of another person * * * the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." That the buyers were Union members and that the Union appealed to them as such is likewise irrelevant in determining whether, in responding to the appeal, the buyers exercised authority which they possessed as "agents" or as "employees." Section 8(b)(4)(A) does not distinguish between the action of agents of an employer who are union members and those who are not.[12]

Secondly, the fact that the buyers occupy the status of "employees" generally, because of the preponderance of their other duties, does no more than create the need for deciding whether the buying function, which alone the Union attempted to influence, is a "service" as Section 8(b)(4)(A) uses that term. If the buyers spent a majority of their time in buying, the Board would have treated them as "agents" of the market owners for all purposes,[13] and any inducement directed to them, no matter what character of function it involved, would have been exempt from the reach of the section.[14] By failing to recognize that to establish a violation it must be shown, in addition to all other elements, that the conduct which the Union sought to influence is an "employee" rather than a "man-

12. In *Arkansas Express, Inc.*, 92 NLRB 255, 266, the Board specifically held that: "Neither the definition" of employers and their agents nor the "exclusion of" employers and their agents "from the term 'employee' provide for special treatment of union adherents".

13. *Swift & Co.*, 115 NLRB 752, 753-754.

14. *Arkansas Express, Inc.*, 92 NLRB 255, 266; *Washington Coca Cola Bottling Works*, 107 NLRB 299, 305, aff'd, sub nom., *Washington Coca Cola Works* v. *NLRB*, 220 F. 2d 380 (C.A.D.C.).

agement" function, the majority of the Board and the court below declined to apply the section as written.

(b) By reading the term "employees" as if it had been written alternatively in the singular, and by disregarding the modifying words "of any employer", the majority of the Board and court below also rewrote the statute. The suggestion that this is necessary because Congress must have intended to reach the situation where one employee of each of a number of employers is involved finds no support in the legislative history. This Court has observed (*NLRB* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 687-688), as the Board indeed held in earlier cases, the Congress sought in Section 8(b)(4)(A) to outlaw only strikes and similar concerted refusals to work.[15] A strike, by definition, requires "a combined effort on the part of a body of workers employed by the same employer." *Denver Bldg. & Construction Trades Council*, 82 NLRB 1195, 1197. So understood, the section cannot begin to come into play unless inducement is directed to more than one employee of a particular employer.[16] The holding of the court below on this point is in square conflict with the considered statement of the Seventh Circuit in *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606, 612,

15. *Rabouin, d/b/a Conway's Express*, 87 NLRB 972, 982, aff'd. *sub nom. Rabouin* v. *NLRB*, 195 F. 2d 906, 912 (C. A. 2); *Sealright Pacific, Ltd.*, 82 NLRB 271, 291; *Schultz Refrigerated Service*, 87 NLRB 502, 508. See also, Brief for the NLRB in *NLRB* v. *Denver Bldg. & Construction Trades Council*, No. 393, Oct. term, 1950, p. 22.

16. The court below is manifestly in error in regarding the effect of the Union's activity in this case to be the same as an appeal to many employees of a single employer (pp. 39-40, *infra*). An employer is obviously far better able to cope with insubordination or breach of trust by an individual employee than he is with concerted insubordination by a group of his employees.

that "if there is only one [employee] on each of several jobs, and they each refuse to work, it is not a violation."

(c) Rejection of the view that the section outlaws only strikes and similar concerted refusals accounts for the unwillingness of the Board majority (R. 191, n. 7, *cf.* R. 204-205), and of the court below (pp. 40-41, *infra*), to give to the term "concerted" the meaning accorded to it by this Court in the *International Rice Milling* case, 341 U. S. at 671, namely, simultaneous action by a group of employees. Deemed decisive there was the fact that employees of neutral employers approach a picket line sporadically, at different times; their action in refusing to cross is therefore considered individual, not concerted. For the same reason, the refusal of the buyers in this case to purchase from Swift salesmen whenever a salesman happened to call at a retail market was individual and not concerted action.[17]

(d) The holding of the Board majority and of the court below that the neutral employer's consent to and acquiescence in union induced non-performance of services by his employees is irrelevant wrenches the term "refusal" from its statutory context in which the only "refusals" outlawed are those designed to "force or require" that employer to cease doing business. The "object of any inducement or encouragement given to employees * * * must be to coerce the employer of such employees." *El-*

17. The factors relied on by the court below do not distinguish the cases. The question as this Court posed it in *Rice Milling* is not whether inducement is directed to an individual or to a group but whether the inducement is "aimed at concerted, as distinguished from individual action". Refusal by employees of neutrals to cross a picket line is "parallel action" and involves "unity of effort" in precisely the same sense that refusal to purchase can so be characterized here. Moreover, the appeal of pickets to neutral employees who approach the line is uniformly recognized to rely for its effectiveness on the employees' union membership and loyalty. "The reluctance of workers to cross a picket line is notorious." *Printing Specialties and Paper Convert. U.* v. *Le Baron*, 171 F. 2d 331, 334 (C. A. 9).

liott v. *Amalgamated Meat Cutters, Etc.*, 91 F. Supp. 690, 696 (D. C. Mo.). Again, the holding stems from repudiation of the earlier view that the only inducement the section outlaws is inducement of strikes and concerted refusals in the nature of strikes.[18] This holding is in square conflict with *Rabouin* v. *NLRB*, 195 F. 2d 906, 912 (C. A. 2), where the Section was held to forbid "only a strike against" the neutral employer, and his consent to cessation by his employees of a portion of their work was held decisive against treating the Union's inducement of that cessation as a statutory "refusal".

(e) The departure by the court below from the plain terms of the statute is further emphasized by its holding that the Union's inducement was illegal because its object was "to cause a cessation of business between the employers and the Swift salesmen" (p. 44, *infra*, cf. R. 188). As written, the illegal object is not merely "causing" an employer to cease doing business, it is "forcing or requiring" him to do so. *NLRB* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 687-688, and subsection (d), above. The interpretation below is also in square conflict with the holding of the Second Circuit in *Douds* v. *International Longshoremen's Association*, 224 F. 2d 455, 459, cert. denied, 350 U. S. 873, that "object" as defined in Section 8(b)(4)(A) must not be construed so broadly as "to cover all acts in a labor dispute that are known or intended to result in a cessation of business between others."

The reason advanced by the court below for refusing to restrict the scope of outlawry to attainment of the precise object proscribed "by the specific means which the section

18. Cases cited note 15, *supra*. The legislative history strongly supports the Board's original view. See 93 Cong. Rec. 3834, 4199, 6445-6446, 2 Leg. Hist. L.M.R. A., 1005-1006, 1107-1108, 1544.

defines"[19] is that "no pressure could have been more successful in 'requiring' the market owners to cease purchasing from Swift salesmen than the means here employed" (p. 43, *infra*). But other courts of appeals have recognized that Congress deliberately and intentionally left labor organizations free to accomplish the proscribed object by means other than those the statute specifically proscribes, although such means may be equally effective. Thus, a labor organization may, without violating Section 8(b)(4)(A), force a neutral employer to cease doing business by threats of all kinds, even that it will call a strike against him. *Rabouin* v. *NLRB*, 906, 911, 912 (C. A. 2); *NLRB* v. *Business Mach. & Office A., Etc.*, 228 F. 2d 553, 559 (C. A. 2), cert. denied, 351 U. S. 926.[20] It may also lawfully compel a neutral to cease doing business by inducing his customers to boycott him, even though such a boycott is clearly "secondary". *NLRB* v. *Business Mach. & Office A., Etc., ibid.* Consequently, neither the intensity of the pressure exerted, nor its potential success, can be relevant in determining whether any particular means are among those which the section condemns.

II. The Distinction Between Primary and Secondary Boycotts.

The second basic conflict in approach stems from the Board's reversal, approved in this case by the court below, of its prior doctrine that action by a neutral's employees which is directed against the primary employer at a primary situs of the dispute is primary and lawful even though such action necessarily entails disobedience to the neutral employer's instructions to perform services

19. *Joliet Contractors Assn.* v. *NLRB, supra*, p. 18.

20. Accord: *Schatte* v. *International Alliance, Etc.*, 182 F. 2d 158, 165 (C. A. 9), cert. denied, 340 U. S. 827.

in the course of their employment, and even though, in consequence, the neutral employer is forced to cease doing business with the primary employer.[21]

Basic to this doctrine was the Board's recognition that Congress in Section 8(b)(4)(A) intended to ban only "*secondary* boycotts and *secondary* strike activities". *Schultz Refrigerated Service, Inc.*, 87 NLRB 502, 504. The Board repeatedly pointed out (note 21, *supra*), that labor organizations almost always attempt to enlist the aid of employees of neutral employers against the employer with whom they are involved in a labor dispute; that the purpose of such appeals is always to induce such employees to withhold their services from the primary employer, and that action taken in response to appeals for action of that kind must be regarded as primary and lawful rather than secondary and unlawful, else Section 8(b)(4)(A) would outlaw virtually every effective concomitant of a primary strike. As Judge Learned Hand put it in *Douds* v. *International Longshoremen's Association*, 224 F. 2d 455, 459 (C. A. 2), cert. denied, 350 U. S. 873: "All strikes and 'concerted refusals' to work involve some cessation of business; that is the only sanction they can have". If, therefore, intention to cause a cessation of business were itself regarded as the unlawful object, Congress "would have made nearly all strikes unlawful".

Accordingly, the Board distinguished among appeals to a neutral's employees by determining whether or not the action encouraged in each case was to be directed entirely against the primary employer, at a primary situs of the

21. *Oil Workers International Union (The Pure Oil Company)*, 84 NLRB 315, 319-320; *United Electrical, Radio & Machine Workers of America, et al. (Ryan Construction Corporation)*, 85 NLRB 417, 418; *International Brotherhood of Teamsters, etc. (Schultz Refrigerated Service, Inc.)*, 87 NLRB 502, 504-505; *Sailor's Union of the Pacific (Moore Drydock Co.)*, 92 NLRB 547.

dispute. The subsidiary tests for making that determination were enunciated in the leading case, *Moore Dry Dock Company*, 92 NLRB 547, 549, 551-552. Where the action induced directly affected the primary employer at a primary situs of the dispute, the Board held the action primary, and treated its impact on the neutral employer's business as "incidental". *NLRB* v. *Service Trades Chauffeurs, Etc.*, 191 F. 2d 65, 67, 68 (C. A. 2); *Schultz Refrigerated Service, Inc.*, 87 NLRB, at 508. Consequential injury to the neutral employer the Board held insufficient to "convert lawful primary action into unlawful secondary action within the meaning of Section 8(b)(4)(A)." *The Pure Oil Company*, 84 NLRB 315, 319-320.

Under this approach the Board held that appeals to a neutral employer's employees which are made to them orally or in writing at their employer's place of business, even though that place has no nexus whatever with the primary dispute, is primary and lawful if the action induced is only to refrain from rendering services directly to the primary employer at a primary situs of the dispute. *Moore Dry Dock Company*, 92 NLRB, at 551-552; cf. *The Pure Oil Co.*, 84 NLRB, at 319. The Board held such appeals primary and lawful even where the Union involved was *not* engaged in picketing at the primary situs. *Interborough News Co.*, 90 NLRB 2135, 2145, 2149-2150. Finally, the Board recognized that when in the course of their work employees of the primary employer call temporarily at the place of business of a neutral or secondary employer, those premises become, *pro tanto*, a primary situs of the dispute. *Schultz Refrigerated Service*, 87 NLRB 502, 504-505; *NLRB* v. *Service Trades Chauffeurs, etc.*, 191 F. 2d 65, 67-68 (C. A. 2).

It was in this approach that this Court found "conformity with the dual congressional objectives of preserving

the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own". *NLRB* v. *Denver Bldg. & Construction Trades Council,* 341 U. S. 675, 692.

Thereafter, however, the Board radically altered its approach. Instead of treating all appeals to employees of secondary employers as primary and lawful if the only action requested is to be directed against the primary employer or his employees at a primary situs of the dispute, the Board began to treat all such appeals as secondary and unlawful unless they are "incidental" to simultaneous appeals to "employees sought to be organized" (R. 190) or, as the court below put it, unless they are a "by-product of picketing against the primary employer" (p. 45, *infra*). While retaining "primary-secondary" language, the new approach treats intention to cause an "interruption of business" (R. 188), as sufficient to establish that the object of the inducement is "secondary."

Minimization of the appeal of pickets to employees of neutral employers who approach the line as being merely "incidental" to an appeal to employees of the primary employer is itself in conflict with the Board's earlier recognition that picket lines are "necessarily designed" to induce employees of neutral employers not to cross. *The Pure Oil Company,* 84 NLRB, at 318.[22] And it is plainly incompatible with *International Rice Milling Co.* v. *NLRB,* 341 U. S. 665, 669, where the pickets used violence to keep employees of a neutral employer from enter-

22. See also, *Printing Specialties and Paper Convt. U.* v. *Le Baron,* 171 F. 2d 331, 334 (C. A. 9); *Schultz Refrigerated Service, Inc.,* 87 NLRB, at 504; *Washington Coca Cola Bottling Works,* 107 NLRB 299, 302.

ing the plant, and where this Court recognized (at p. 671) that the picketing was "directed beyond" employees of the mill and was intended to induce employees of neutral employers not to cross the line.[23]

Absence of statutory warrant for distinguishing between one and another form of inducement of employees of a neutral was observed by this Court in the *International Rice Milling* case, 341 U. S. 665, 672. Particularly is there no statutory basis for distinguishing between picketing and other means, for, as this Court held in the *Secondary Boycott Cases*, 341 U. S., at 672; 341 U. S., at 687, and 341 U. S., at 701-702, picketing is brought within the sweep of Section 8(b)(4)(A) only because it is a means of inducement of neutral employees, and the legality of any form of inducement must be determined exclusively by the object of the action induced, not by whether the inducement is itself "direct" or "incidental". As the Court of Appeals for the Fifth Circuit recently observed in rejecting the Board's new approach, what the Board accomplishes by it is to substitute its own "judgment as to the propriety and

23. As far as appears from its decision (R. 190), the only reason the Board resorted to an artificial and inaccurate characterization of primary picketing was its realization that otherwise its new approach would outlaw even primary picketing at the offending employer's plant, a result which simply could not be reconciled, by any rationalization, with the contrary holding of this Court in the *International Rice Milling* case. Under its new theory the Board has even attempted drastically to curtail primary picketing by restricting to a single place rather than to the "primary situs" the union's right to picket a primary employer. The theory now is that a union may not picket at any place which is a "common situs" of the primary dispute if it is able to picket at premises where the primary employer alone does business. *Washington Coca-Cola Bottling Works*, 107 NLRB 299, 303. Where the union can picket at the primary employer's own premises, the Board now says that such picketing is "adequate" to publicize the dispute, and therefore all picketing at a "common situs" is *ipso facto* secondary. That aspect of the Board's new approach the court below condemned in *Sales Drivers* v. *NLRB*, 229 F. 2d 514, cert. denied 351 U. S. 972.

adequacy of the means employed in a labor dispute" for "the sole statutory test of the unlawfulness of the end or objective sought". *NLRB* v. *General Drivers, Etc.*, 225 F. 2d 205, 209 (C. A. 5), cert. denied, 350 U. S. 914.[24]

The instant case shows that this is exactly what happens. The Board and the court below discarded as irrelevant the fact that the only action induced was directed at Swift's salesmen, who were the Union's adversaries in the primary dispute, and was to occur only when salesmen sought orders in the stores and thereby made the stores the "situs" of the primary dispute. Under the original approach to the "primary-secondary" distinction these facts would have sufficed to establish that the boycott of Swift's salesmen by the buyers, and hence the Union's action in inducing it, at the markets or elsewhere, was "primary", not "secondary", even though the markets, in consequence of the buyer's action, necessarily ceased doing business with Swift. *Elliott* v. *Amalgamated Meat Cutters, etc.*, 91 F. Supp. 690, 696, 699 (D. C. Mo.). Treatment of such a boycott as "primary" conforms to the historic distinction between "primary" and "secondary" action as those terms were understood prior to passage of the Act.[25] And such

24. The Board's use of the terms "direct" and "incidental" in articulating its new approach appears to be designed to maintain an appearance of continuity with the prior test in which those terms were used to describe the impact of the action of neutral employees on their own employer, rather than to distinguish between means of inducement directed to them. Nevertheless, as the *General Drivers* case shows, the drastic nature of the change has not escaped judicial observation.

25. *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 466; Teller, *Labor Disputes & Collective Bargaining*, Vol. I, p. 454; Frankfurter & Greene, *The Labor Injunction* (Macmillan Co., 1930), p. 43; Laidler, *Boycotts and the Labor Struggle*, p. 64; Oakes, *Organized Labor and Industrial Conflicts* (1927), Section 408. All of the authorities defined a "primary boycott" as a combination to refrain from dealing with an immediate adversary, and a secondary boycott as the exertion of pressure against a neutral to compel him to refrain. Cf. *IBEW* v. *NLRB*, 181 F. 2d 34, 37 (C. A. 2), aff'd, 341 U. S. 694.

treatment alone comports with Congress' intention to limit outlawry to "secondary boycotts". *NLRB* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 686, 692; H. Conf. Rep. No. 510, 80th Cong. 1st Sess., p. 43; 93 Cong. Rec. 4198, 6445-6446.

The Courts of Appeals for the Second and Fifth Circuits have condemned the Board's new approach as being inconsistent with Congress' intention. *NLRB* v. *Business Mach. & Offices A., Etc.*, 228 F. 2d 553 (C. A. 2), cert. denied, 351 U. S. 962; *Douds* v. *International Longshoremen's Association*, 224 F. 2d 455, 459, cert. denied, 350 U. S. 873; *NLRB* v. *General Drivers, Etc.*, 225 F. 2d 205, 209 (C. A. 5), cert. denied, 350 U. S. 914. In addition, that approach, which treats as "secondary" all action of a neutral's employees which is intended to cause a cessation of business between the neutral and a party to the dispute, is in square conflict with the earlier holding of the Second Circuit in *NLRB* v. *Service Trades Chauffeurs, etc.*, 191 F. 2d 65, 67 (C. A. 2)[26]; followed in *Douds* v. *Sheet Metal Workers International Association*, 101 F. Supp. 273, 278-279 (D. C. E. D. N. Y.).

III. The Public Importance of the Issues.

The questions here presented go to the heart of the balance of economic forces between labor and management which Congress created in the Act. The conflicts in approach and most of the specific questions affect the day to day conduct of every labor organization in the country and have application to virtually every labor dispute subject to the Act. The questions involve not only application of Section 8(b)(4)(A), but also Section 303 of the

26. "The Taft-Hartley Act does not completely shelter neutrals—in this case, so-called 'secondary' employers. If it did, strikes would often be hopelessly crippled."

Labor Management Relations Act, which authorizes suits for damages against labor organizations on conduct described in language identical with Section 8(b)(4)(A). The questions are ripe for decision. They should be settled by this Court in the public interest.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Sec. 2. When used in this Act— * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, * * *.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, * * * but shall not include * * * any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, * * *.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

or protection, and shall also have the right to refrain from any or all of such activities * * *.

Sec. 8(b). It shall be unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Section 303 of the Labor Management Relations Act of 1947, 61 Stat. 158, 29 U. S. C. § 187, provides as follows:

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organiza-

tion or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

APPENDIX B.

UNITED STATES COURT OF APPEALS,
For the District of Columbia Circuit.

No. 12891.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, Petitioner,

v.

National Labor Relations Board, Respondent,
Swift & Company, Intervenor.

No. 12931.

Swift & Company, a Corporation, Petitioner

v.

National Labor Relations Board, Respondent,
Amalgamated Meat Cutters and Butchers Workmen of North America, AFL, Local 88, Intervenor.

On Petition to Review and Set Aside and on Request for Enforcement of an Order of the National Labor Relations Board (No. 12891) and On Petition to Review and to Amplify the Same Order of the Board (No. 12931).

Decided June 22, 1956.

Mr. Mozart G. Ratner, of the bar of the Supreme Court of Illinois, pro hac vice, by special leave of Court, with

whom Messrs. Martin F. O'Donoghue and Thomas X. Dunn were on the briefs, for Petitioner in No. 12891 and intervenor in No. 12931.

Mr. G. Carroll Stribling, with whom Mr. Earl G. Spiker was on the briefs, for intervenor in No. 12891 and petitioner in No. 12931.

Mr. Duane Beeson, Attorney, National Labor Relations Board, of the bar of the Supreme Court of California, pro hac vice, by special leave of Court, with whom Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, was on the brief, for respondent. Mr. Winthrop A. Johns, Counsel National Labor Relations Board, also entered an appearance for respondent.

Before Fahy, Washington and Danaher, Circuit Judges.

Fahy, Circuit Judge: The major issue in these appeals is whether the National Labor Relations Board erred in ordering the Amalgamated Meat Cutters & Butcher Workmen of North America, Local 88, hereinafter called the Union, to cease and desist from certain practices found by the Board to violate section 8 (b) (4) (A).[1] the

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[1] 61 Stat. 140-41 (1947), 29 U. S. C., § 158 (b) (4) (A) (1952). The section reads as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *."

"secondary boycott" provision of the National Labor Relations Act. A subsidiary question is whether this court should declare that the Board's order also applies to certain other activities of the Union.

The Union's membership is principally composed of persons engaged in the wholesale and retail distribution of meat and meat products in St. Louis, Missouri. These cases arose out of attempts of the Union to organize the salesmen employed by Swift & Company to sell meat at wholesale to retail stores in the St. Louis area. On September 10, 1953, the Union began picketing Swift's St. Louis Independent Packing Company plant. The very next day, however, Swift secured an order from a state court which enjoined all further picketing. The Union then turned to the tactics which became the subject of the proceedings before the Board.

The Union's membership included many persons who were responsible for buying meat at wholesale for retail stores or markets, terms we use interchangeably. Some of these were the owners of the stores themselves, while others were employees to whom owners or managers had delegated purchasing authority. The Union called upon these members to aid in its organizational drive by refusing to purchase from the Swift salesmen unless the latter joined the Union. This request was made at Union meetings, in Union literature mailed to its members, and by personal appeals to the buyers by Union representatives who visited the markets. Because of the Union's plea for support a number of Union members curtailed their purchases from Swift salesmen or ceased purchases altogether. The Secretary-Treasurer of the Union also told the members that if their employers "insisted" on buying Swift products, they should "sell it and display it," but the record discloses only one instance where an owner overruled a buyer. In the other instances where the owners or managers were informed of a buyer's refusal

to patronize the Swift salesmen they were unwilling to interfere, sometimes indicating a fear of Union reprisals.

A majority of the Board found that the Union had violated section 8(b) (4) (A) when its representatives called at the meat markets and there induced buyers who were employees of the market owners to refuse on behalf of their employers to buy Swift products from Swift salesmen, with an object of forcing or requiring the employers to cease handling Swift products and doing business with Swift salesmen.[2] The Board's order requires the Union to cease and desist from this type of activity. The Board declined, however, to pass on the legality of the Union's conduct "within its own organization," that is, the appeals at Union meetings and in Union literature.

In No. 12,891 the Union petitions us to set aside the Board's order, contending that the finding of a section 8(b) (4) (A) violation is not supported by the evidence and cannot be squared with either the language or the intent of that section. In its answer to this petition the Board requests the enforcement of its order. On the other hand, Swift, the petitioner in No. 12931, asks the court to clarify the Board's order by declaring that it covers the Union's activities "within its own organization."

The Union says, in the first place, that its appeals were not addressed to "employees," because the buyers were performing a managerial function and hence were acting as agents of their employers. Reliance is placed upon section 2(2) of the Act,[3] which defines the term "employer" to include "any person acting as an agent

[2] The dissenting member agreed with the Trial Examiner, who had exonerated the Union.

[3] 61 Stat. 137 (1947), 29 U. S. C. § 152(2) (1952), amending 49 Stat. 450 (1935).

of an employer." The applicable definition, however, is that of "employee" in section 2(3),[4] since section 8(b)(4)(A) prohibits the inducement of "employees." That term is defined as including "any employee" with certain specific exceptions, such as supervisors. There is no broad exception for agents of employers, and the Union does not contend that the buyers fall within any of the specific exceptions. Consequently we think that the buyers are "employees" within the meaning of section 8(b)(4)(A), and the fact that they may also be agents of employers does not eliminate them from the scope of that section. The policy of the Act does not require a departure here from the ordinary meaning of the statutory language. See **Phelps-Dodge Corp. v. NLRB**, 313 U. S. 177, 191; **NLRB v. Armour & Co.**, 154 F. 2d 570, 574, cert. denied, 329 U. S. 732.

The Union says that its appeals were directed at only one employee of each employer, while the section 8(b)(4)(A) proscription is limited to the inducement or encouragement of "employees" of any employer. This provision, however, must be read in conjunction with the following general rule of statutory construction embodied in 61 Stat. 633 (1947), as amended, 1 U. S. C., § 1 (1952):

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> "words importing the singular include and apply to several persons, parties, or things;
>
> "words importing the plural include the singular; * * *."

Application of this rule to the instant case seems "necessary to carry out the evident intent of the statute." **First National Bank v. Missouri**, 263 U. S. 640, 657. The

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[4] 61 Stat. 137-38 (1947), 29 U. S. C. § 152(3) (1952), amending 49 Stat. 450 (1935).

effect of the Union's activity is the same in this case, where many employees of various employers are involved, as it is where many employees of a single employer are involved. Congress must have intended section 8 (b) (4) (A) to apply to this type of situation.[5]

A related argument of the Union is that it did not induce or encourage "concerted" activity by the buyers. It relies on **NLRB v. International Rice Milling Co.**, 341 U. S. 665, where the Supreme Court held that the actions of pickets in seeking to persuade two employees of a neutral employer not to cross a primary picket line were not violations of section 8 (b) (4) because there was no inducement to concerted conduct. The Court stated:

> "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8 (b) (4) and they do not here." Id. at 671.

The Court considered the case to involve merely an individual solicitation directed at an employee to make his own determination not to cross the picket line. In the instant case, however, the appeals were to the employees as members of a group, encouraged parallel action, and were not incidental to primary picketing. It would be artificial to say that the Union did not encourage a unity of effort, and therefore concerted action, on the part of the employees. We think this type of inducement is designed to secure concerted conduct and does not fall within the scope of the **Rice Milling** decision. Cf. **Piezonki**

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[5] If the dicta in Joliet Contractors Association v. NLRB, 202 F. 2d 606, 612 (7th Cir.), cert. denied, 346 U. S. 824, is contrary to our conclusion, we find ourselves unable to agree.

v. **NLRB**, 219 F. 2d 879, 883 (4th Cir.); **NLRB v. Denver Bldg. Council**, 193 F. 2d 421, 424 (10th Cir.); **NLRB v. Service Trade Chauffeurs**, 191 F. 2d 65, 67 (2d Cir.); **Schauffler v. United Association of Journeymen**, 230 F. 2d 572, 574 (3d Cir.). See, also, Comment, 50 Mich. L. Rev. 315, 326-30; Note, 62 Yale L. J. 1111, 1120-22.

The Union next argues that it did not induce the buyers to "refuse" to purchase from the Swift salesmen, because a "refusal" within the meaning of section 8 (b) (4) (A) implies action contrary to the express or implied orders of the neutral employer. But the employees did refuse in the ordinary sense of that word. The law is in a state of some confusion with regard to whether this statutory term should be given its ordinary meaning. See, e. g., **Sand Door & Plywood Co.**, 113 NLRB No. 123; **Pittsburgh Plate Glass Co.** 105 NLRB 740; **Rabouin d/b/a Conway's Express**, 87 NLRB 972, aff'd sub nom. **Rabouin v. NLRB**, 195 R. 2d 906 (2d Cir.); Note, 64 Yale L. J. 1201. We do not feel called upon to decide this issue. The Board found, with ample support in the evidence, that the "discretion vested in the buyers by their employers was one to be exercised solely in the employer's interest and was not a discretion to accomplish some ulterior aim of the buyers themselves." The Board concluded, "It seems plain that the Union here induced employees to refuse to perform or to refrain from performing for their employers a service they had theretofore performed, i. e., to determine solely on the basis of objective criteria whether the purchase of Swift products was in the interest of their employer." The Board's delineation of the employees' duties as agents of their employers is supported not only by the evidence but by the general law of agency. See **Restatement of Agency** §§ 387, 424 (1933). It is clear from the Board's findings that the Union appealed to the employees to abuse the discretion delegated to them, for it asked them to cut off purchases because of the Union's

interests regardless of whether such action might or might not be advantageous to their employer. Their accession to such appeals constituted a "refusal."[6]

The Union also contends that since buying is not one of the services specifically enumerated in section 8 (b) (4), nor similar to those which are listed, it does not fall within the reach of that section. The section's proscription applies to inducements not "to use, manufacture, process, transport, or otherwise handle or work on any goods * * * or to perform any services." The Union's ejusdem generis argument is that the activities specifically enumerated are usually performed by employees whereas buying is generally handled by owners or supervisors. But in the context of this case buying clearly is one of the "services" the employees are required "to perform." The principle of ejusdem generis "gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards." **United States v. Gilliland**, 312 U. S. 86, 93. Congress here provided "added safeguards" by inserting the "alternative provisions" "otherwise handle or work on any goods * * * or to perform any services," so that the section would cover employee activity reasonably calculated to produce the results which Congress wished to prevent.

The Union's final statutory argument is that the Board erred in finding that the "object" of the boycott was "forcing or requiring" any market owner to cease doing business with Swift. The Union contends that its real

[6] A Union argument closely allied to the one just discussed is that there was no inducement of action on the part of the employees "in the course of their employment," because they were not required by the terms of their employment to continue purchasing from Swift salesmen. But, as has been seen, they were obliged not to cease this purchasing simply because of the interests of the Union. Moreover, a function of most of the buyers was to determine with whom orders should be placed, and consequently the making of the decisions here involved was plainly in the course of their employment.

object was to persuade the Swift salesmen to join the Union. True, no doubt, this was the ultimate object, but that does not insulate the Union's actions where the Board finds on sufficient evidence, as here, that such ultimate object is sought by prohibited means. A finding of an illegal intermediate object is all that is required. "It is not necessary to find that the **sole** object of the strike was that of forcing the contractor to terminate the subcontractor's contract." **NLRB v. Denver Bldg. Council**, 341 U. S. 675, 689. The Union argues, however, that in any event it cannot be said that an object of the refusal to purchase was "forcing or requiring" the cessation of business between any market owner and Swift, because "once the buyers ceased purchasing, business relations between the markets and Swift were automatically terminated and no action by the market owner was required or even contemplated." We cannot accept such a narrow definition of terms, for it is not consonant with the intent of the statute and is not necessitated by its language. No pressure could have been more successful in "requiring" the market owners to cease purchasing from Swift salesmen than the means here employed.

Apart from these statutory arguments the Union contends that the evidence is insufficient to support the finding that there was inducement of "employees." There was no direct evidence that any of the buyers contacted by Union representatives at the markets were employees. The Union argues that such evidence is required in this case because some of the Union's members were market owners or supervisors. But a finding of the Board need not necessarily be supported by direct evidence. See **Radio Officers v. NLRB**, 347 U. S. 17, 48-49; **NLRB v. Link-Belt Co.**, 311 U. S. 584, 602. We think that the finding in question is sufficiently sustained by circumstantial evidence, especially in light of the failure of the Union to undertake to establish, as it had ample opportunity to do,

that none of the buyers solicited were employees. The record shows that the majority of the Union's members were employees within the meaning of section 8 (b) (4), and that the Union's business representative admitted he was "almost constantly calling on * * * [Union] members in the shops and urging them to buy only from union salesmen." In view of these considerations, we think the Board was justified in concluding that "at least some" of the Union members appealed to were employees.

The final argument of the Union is that even conceding the boycott technically falls within the terms of the statute, the circumstances of this case make the boycott "primary" rather than "secondary"; and since section 8 (b) (4) was intended to ban only secondary action, the Board's order must be vacated. We will assume that this interpretation of the statute is correct. See **NLRB v. Denver Bldg. Council**, supra, at 686, 692; **Di Giorgio Fruit Corp. v. NLRB**, 89 U. S. App. D. C. 155, 162, 191 F. 2d 642, 649, cert. denied, 342 U. S. 869; Comment, 50 Mich. L. Rev. 315. We cannot agree, however, with the Union's characterization of its activity. It contends that the boycott was primary for two reasons. In the first place, it says, "Refusal to patronize one's adversaries in a labor dispute is the classic 'primary boycott.'" But this was not a consumer boycott. Here the appeals to the buyers were not designed simply to induce them to withdraw their personal patronage from Swift, but rather were meant to move them to stop purchasing on behalf of their employers and thus to cause a cessation of business between the employers and the Swift salesmen. This type of union activity falls squarely within the intent of the statute. But, the Union further maintains, its appeals encouraged action by the buyers at the primary situs of the dispute and therefore were not illegal, though that situs was also a neutral employer's place of business. The Union cites a number of "common situs" cases, including **Moore Dry**

Dock Co., 92 NLRB 547; **Sales Drivers v. NLRB**, ... U. S. App. D. C. ..., 229 F. 2d 514, cert. denied, ... U. S. ...; **NLRB v. Chauffeurs, Teamsters**, 212 F. 2d 216 (7th Cir.); and **NLRB v. Service Trade Chauffeurs**, 191 F. 2d 65 (2d Cir.). The direct appeals here made to the employees of neutral employers, however, can hardly be classed with the "incidental effect" upon such employees which we stated in **Sales Drivers v. NLRB**, supra, might in some circumstances be a permissible by-product of picketing directed against the primary employer. See, also, **Piezonki v. NLRB**, 219 F. 2d 879, 882-83 (4th Cir.); **NLRB v. Service Trade Chauffeurs**, 191 F. 2d 65, 67 (2d Cir.). We agree with the Board's disposition of this issue. It stated:

> "The 'roving situs' decisions upon which the Respondent [Union] relies are inapposite here. Where picketing is involved, or other forms of inducement directly aimed at employees sought to be organized, the Board must, and does, recognize a certain degree of inevitable inducement of the employees of neutrals. In the absence of conduct directly aimed at the primary employees, however, there is no question of incidental as distinguished from direct inducement. Here the principal inducement shown was a direct appeal, on the very premises of neutral employers, to the latter's employees to refrain from performing one of their assigned tasks."

Since we hold that the Board did not err in finding that the Union's activities at the meat markets constituted violations of section 8 (b) (4) (A), we will enforce the Board's order insofar as it prohibits such inducements and any similar ones occurring at the markets. Swift asks us to go further and declare that the order also proscribes the appeals made at Union meetings and through its bulletins. Swift contends that the evidence clearly proves these inducements to be illegal. Hence, the argument goes,

they are covered by the order, phrased in the broad terms of the statute, and this court should so declare so as to clear up the ambiguity engendered by the Board's refusal to decide whether these activities violated the statute. We agree that there is ambiguity, but we do not feel free to dispel it in the manner requested by Swift. No doubt the Board may fashion an order so that it not only prohibits the actions specifically found to be illegal but also activities of a somewhat different nature which might be resorted to in an attempt to circumvent the Board's decision. See **Electrical Workers v. NLRB**, 341 U. S. 694, 705-706; **American Newspaper Publishers Ass'n v. NLRB**, 193 F. 2d 782, 799 (7th Cir.); **Evans v. International Typographical Union**, 81 F. Supp. 675, 678 (S. D. Ind.). Here, however, not only did the Board specifically refuse to pass upon the legality of the appeals made at the Union's meetings and through its literature, but a prior Board decision, **Western, Inc.**, 93 NLRB 336, raises considerable doubt whether the Board would consider these appeals to be violations of section 8 (b) (4) (A). In these circumstances we cannot interpret the Board's order to apply to such activities. We agree with the Union's contention that on the findings made by the Board its order, broad in terms, is not to be construed as prohibiting the activities at Union meetings or through the mailing of literature, the validity of which the Board declined to decide.

The order of the Board, as interpreted by this opinion, will be enforced.

It is so ordered.

APPENDIX C.

United States Court of Appeals
For the District of Columbia Circuit.

No. 12891

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, Petitioner

v.

National Labor Relations Board, Respondent,
Swift & Company, Intervenor

No. 12931

Swift & Company, a Corporation, Petitioner

v.

National Labor Relations Board, Respondent
Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, Intervenor

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On Petitions for Rehearing

Decided September 13, 1956

Before Fahy, Washington and Danaher, Circuit Judges.

Per Curiam: In a petition for rehearing the Union urges that our treatment of the meaning of "employees" to include the buyers, though they might also have been agents of the employers, is both erroneous and inconsistent with the Board's uniform interpretation of the term "employees," as recently exemplified by the following state-

ment of the Board in **Swift & Co.**, 115 NLRB No. 105, decided March 9, 1956:

> "It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management.[2] Such individuals cannot be deemed to be employees for the purposes of the act.

This is the latest of a series of decisions in which the Board has excluded from employee bargaining units persons whose interests were found to be so closely allied with those of the employer that they should be considered representatives of management rather than "employees." Our opinion, therefore, was too broadly phrased. Nevertheless we are of the view that the buyers in the present case were so identified with employee and Union activity as to be within the statutory meaning of "employees" for purposes of section 8 (b) (4) (A). The Union contends that even if such identification would bring them within the meaning of "employees" in a representation proceeding, the crucial issue here is whether the buyers were approached by the Union in their capacity as representatives of management or as employees. Assuming this to be a proper statement of the issue the outcome remains the same, for the Board treated the inducement or encouragement as directed to the buyers as employees, with ample support in the record.

In Swift's petition for rehearing we are again urged to hold that the Board erred in refusing to pass upon the legality of the appeals made at the Union's meetings, or to remand to the Board to require it to decide this issue. Under the circumstances here presented we do not think the statute made such a decision mandatory upon the Board, or that we are required to remand the case for such a decision by the Board.

The petitions for rehearing are denied.

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[2] See Section 2 (2) and (3) of the Act, * * *."

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit.
April Term, 1956.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88,
Petitioner,
v.
National Labor Relations Board,
Respondent,
Swift & Company,
Intervenor.
No. 12,891.

Swift & Company, a Corporation,
Petitioner,
v.
National Labor Relations Board,
Respondent,
Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88,
Intervenor.
No. 12,931.

(United States Court of Appeals for the District of Columbia Circuit. Filed, Jun 22, 1956, Joseph W. Stewart, Clerk.)

On Petition to Review and Set Aside and on Request for Enforcement of an Order of the National Labor Relations Board (No. 12,891) and on Petition to Review and to Amplify the Same Order of the Board (No. 12,931).

Before: Fahy, Washington and Danaher Circuit Judges.

Judgment.

These cases came on to be heard on the record from the National Labor Relations Board and on (1) a petition to review and set aside an order of the National Labor Relations Board (No. 12,891); (2) on the request of the Board for enforcement of said order (No. 12,891); and (3) on a petition to review and to amplify said order of the Board (No. 12,931); and said cases were argued by counsel.

On Consideration Whereof, it is ordered by this Court that the order of the National Labor Relations Board on review in these cases, as interpreted by the opinion of this Court, shall be enforced.

Pursuant to Rule 38 (1) of this Court, the respondent shall within 10 days hereof serve and file a proposed enforcement decree.

Dated: June 22, 1956.

Per Circuit Judge Fahy.

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, Petitioner, v. National Labor Relations Board, Respondent, Swift and Company, a Corporation, Intervenor.	No. 12,891.
Swift and Company, a Corporation, Petitioner, v. National Labor Relations Board, Respondent, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local 88, Intervenor.	No. 12,931.

Decree Enforcing an Order of the National Labor Relations Board.

(United States Court of Appeals for the District of Columbia Circuit. Filed Jul. 23, 1956, Joseph W. Stewart, Clerk.)

Before: Fahy, Washington and Danaher, Circuit Judges:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated

July 26, 1955. The Court heard argument of respective counsel on March 14, 1956, and on June 22, 1956, being fully advised in the premises, handed down its decision enforcing the order of the Board as interpreted by the Court's opinion. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed by the Court that Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local No. 88 (hereinafter called the Union), St. Louis, Missouri, and its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from inducing or encouraging the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is forcing or requiring any employer or person other than Swift and Company to cease handling the products of Swift and Company or doing business with its salesmen.

2. Take the following affirmative action, which the National Labor Relations Board has found will effectuate the policies of the National Labor Relations Act, as amended (hereinafter called the Act):

(a) Post at its business offices and meeting halls in the St. Louis, Missouri, area, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Fourteenth Region of the National Labor Relations Board, St. Louis, Missouri, shall, after being duly signed by the Union be posted by the Union immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said

notices are not altered, defaced, or covered by any other material.

(b) Mail to the aforesaid Regional Director signed copies of the said notice for posting at Swift and Company's St. Louis, Missouri, plant, Swift and Company willing, at places where notices to its salesmen or other employees are customarily posted.

(c) Notify the said Regional Diector in writing, within ten (10) days from the date of this Decree, what steps the Union has taken to comply herewith.

/s/ Charles Fahy,
Judge, United States Court of Appeals
for the District of Columbia Circuit.

/s/ George T. Washington,
Judge, United States Court of Appeals
for the District of Columbia Circuit.

/s/ John A. Danaher,
Judge, United States Court of Appeals
for the District of Columbia Circuit.

APPENDIX.

Notice to Members.

Pursuant to

A decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

WE WILL NOT induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manu-

facture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is forcing or requiring any employer or person other than Swift and Company to cease handling the products of Swift and Company or doing business with its salesmen.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local No. 88.

(Labor Organization)

Dated .....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Office - Supreme Court, U.S.
FILED
FEB 4 1957
HAROLD T. FEY, Clerk

No. 677.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL, LOCAL 88,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
SWIFT & COMPANY,
Intervenor.

No. 824.

SWIFT & COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL, LOCAL 88,
Intervenor.

On Cross Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF

In Opposition for Swift & Company, Intervenor, in No. 677.

WALTER R. MAYNE,
G. CARROLL STRIBLING,
HAROLD A. THOMAS, JR.,
FORDYCE, MAYNE, HARTMAN,
RENARD & STRIBLING,
508 Olive Street,
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No. 677.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL, LOCAL 88,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
SWIFT & COMPANY,
Intervenor.

No. 624.

SWIFT & COMPANY, a Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL, LOCAL 88,
Intervenor.

On Cross Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF

In Opposition for Swift & Company, Intervenor, in No. 677.

OPINIONS BELOW.

The National Labor Relations Board's majority opinion (R. 186-194), dissenting opinion (R. 194-205) and the Trial Examiner's Intermediate Report (R. 157-186) are reported

at 113 NLRB 275.[1] The initial opinion of the Court below is reported at 237 Fed. (2) 20 (R. I 225); its supplemental opinion on rehearing at 237 Fed. (2) 27 (R. I 256).

JURISDICTION.

The final order of the Court below denying rehearing was entered October 8, 1956 (R. II 62, 63). The Cross Petition for Writ of Certiorari was filed January 4, 1957. The jurisdiction of this Court is invoked by Cross Petitioner under 28 U. S. C. 1254 (1) and under Section 10 (f) of the National Labor Relations Act, as amended.

STATUTE INVOLVED.

The sections of the National Labor Relations Act primarily involved are printed by Petitioner in Appendix "A" to its Petition, pp. 31-32.

QUESTIONS PRESENTED.

Intervenor believes that the Questions Presented by Petitioner (Petition for Certiorari, page 3-4) are phrased in a misleading manner. We would therefore rephrase them as follows, using the same numerical order adopted by Petitioner.

The Union has induced and encouraged all of its members who are butchers employed in the retail markets throughout the metropolitan St. Louis, Missouri, area to join and assist the union's organizing campaign, by concertedly refusing in the course of performing the duties and services normally required by their employment to order or buy the products of Swift & Company on behalf

[1] Except as otherwise specifically stated, citations to the Record in this Brief adopt Petitioner's citations in its Petition, no copy of the Record as prepared in this Case No. 677 having been served on Intervenor, such service not being required under Rule 21 (1) of this Court.

of their neutral employers for sale in their employer's markets, because the salesmen of Swift & Company were not members of the union. The basic question presented is whether the Union thereby did "induce or encourage the employees of any employer to engage in *a strike or* a concerted refusal in the course of their employment *to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities,* or to perform any services, where an object thereof is: forcing or requiring any employer * * * *or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer,* or to cease doing business with any other person."[2]

The specific questions presented for review are whether substantial evidence on the record as a whole supports the findings and conclusions of the Board, which were adopted and approved by the Court below, that Petitioner has violated Section 8 (b) (4) (A) of the Act by the conduct here shown. The specific subsidiary questions, more accurately phrased in the terms of the case actually decided by the Court below, are:

1. Does a union's otherwise illegal conduct come within the prohibition of Section 8 (b) (4) (A) of the Act although the employee function of "buying" is not specifically listed in the broad, general statutory phrase "to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services"?

Does the term "employee," as used in Section 8 (b) (4) (A) and as defined in Section 2 (3) of the Act, to include

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[2] The important language of Section 8 (b) (4) (A) of the Act which is printed in italics above were omitted by petitioner from the quotation used in its statement of the Question Presented.

"any employee" with certain specifically listed exceptions, include grocery store butchers, who exercise varying degrees of discretion in buying for their employers from mere order filling up, and also perform other employee duties, where such butchers do not come within any of the specifically listed exceptions of Section 2 (3)?

2. Must the words "employees of any employer," as used in Section 8 (b) (4) (A), be read in conjunction with the general rule of statutory construction set out in 1 U. S. C., Sec. 1, that words importing the plural include the singular and vice versa, and in accordance with the evident intent of Congress, so as to prohibit illegal inducement of many employees of various employers, as well as many employees of a single employer?

3. Does the union's otherwise unlawful conduct induce and encourage "concerted" action rather than "individual" action where it is directed to over 1500 secondary employees as members of a group and is intentionally designed to achieve parallel action and unity of effort by such employees?

4. Must the term "refusal," as used in Section 8 (b) (4) (A), be given its usual ordinary meaning so as to include a refusal to perform services for the employer and exercise discretion in the interest of the employer as usual, but instead to refrain from performing such services and to act solely in the union's interest, regardless of the resultant disadvantage to the employer?

5. Does the proscribed objective set out in Section 8 (b) (4) (A) of "forcing or requiring any employer * * * or other person to cease using, selling * * * or otherwise dealing in the products of any other producer * * * or to cease doing business with any other person" include the objective here shown when the union admitted its "action was designed and intended solely to disrupt business dealings

between Swift and its non-union salesmen, on the one hand, and their immediate customers, on the other"?

6. Does the evidence in this case sustain the holding of the Board and the Court below that "this type of union activity falls squarely within the intent of the statute" and that the "union's characterization of its activity" to the contrary cannot be accepted?

The Court below decided all the above questions in the affirmative. We submit that on the record and under controlling authorities the Court did not err.

STATEMENT OF THE CASE.

Since we believe petitioner's statement of the facts is inaccurate, less than candid, and misleading (perhaps unintentionally), we feel a counter statement is required and justified. Examples of petitioner's misleading assertions will follow the counter statement.

A. Procedural and Background Facts.

Following the usual procedure under the Act, the Regional Director issued a complaint on April 20, 1954, alleging a violation of Section 8 (b) (4) (A) of the Act. A temporary injunction sought under the mandatory provisions of Section 10 (1) was granted by the District Court (R. I 7)[3] The transcript of evidence before the District Court was incorporated into the record on the Board's hearing so no witnesses were actually heard by the Trial

[3] For consistency we adopt the citation system used by petitioner. References "R. I" are to the bottom page number assigned by the clerk in preparing the Record as designated and filed in No. 624. References "R. II" are to the additional portions designated, filed, and separately paginated by petitioner in No. 677. References "R" are to the numbers at the top of pages of the Joint Appendix printed and filed with the Court below.

Examiner (R. 2).[4] On July 26, 1955, the Board issued its decision and order rejecting the Trial Examiner's Report and adopting his findings and conclusions "only insofar as they are consistent with this decision" (R. 187). The Board held the union had violated Section 8 (b) (4) (A) and issued a cease and desist order. The District of Columbia Court of Appeals in due course affirmed and granted enforcement.

Petitioner Union represents the meat department employees in practically all the retail grocery stores, super markets, and meat markets in St. Louis. Approximately 1400 of its 2700 members are employees employed as clerks, meat cutters, meat wrappers or meat buyers of such stores, including the large chain operations such as Kroger, Food Center, Rapp and A. & P. (R. 16, 30a). The duties performed for their employers by these employees include wrapping and packaging meat, display and arrangement of meat offered for sale to the public in the display cases and self-service cases, and preparation of order forms indicating what meat shall be purchased from the wholesaler or packer for resale by their employer, the retailer (R. 30b). Depending on the size and nature of the particular store, the head meat cutters had varying degrees of control over what meats were purchased, ranging from almost complete discretion to purchase the type and brands they thought best in the interest of their employer, to mere power of recommendation on preliminary order forms (R. 57, 60-61, 67, 161).

St. Louis area meat packing companies employ "white collar" salesmen to call upon the retail trade, personally and by phone, to sell their particular brands.

In the Spring of 1952, the Union began a campaign to organize all the white collar meat salesmen in the St. Louis

[4] See note 3, supra.

area, which by September of 1953 had been successful in organizing the salesmen of all but the three major companies, one of which was St. Louis Independent Packing Co., Division of Swift & Company, whose principal brand name is "Mayrose." In carrying on its campaign to organize Swift's salesmen, no officer or business agent of the Union ever called upon or in any way approached any Swift salesmen for the purpose of persuading them to join or of advising them of the alleged benefits of membership. While asserting a purpose only to organize salesmen and declaring no dispute with the Company itself, the Union thus rejected every logical and customary means of direct organization and relied instead on pressure against the employer (R. 29). The task of organizing Swift salesmen was abandoned by the Union officers and business agents and instead delegated to the members employed in the retail markets on whom the salesmen were dependent for the purchase of their products for the retail stores. These employee-members thus became individual organizers for the union, in fact, the only ones engaged in organizing these particular salesmen (R. 29).

Union President Nick Blassie, at the September, 1953, Union meeting and repeatedly at every meeting thereafter directed his members not to purchase, patronize or support the Mayrose product or the Mayrose salesmen, but instead to buy from, and support, only salesmen who were members of the Union (R. 30-32, 35-36). These instructions were given in the general union meetings, and while "especially" applicable to those members with buying power for their employers, were also addressed to those members who handled or displayed meat for their employers (R. 116). Not satisfied with merely giving such instructions, the Union policed the stores to see that this policy was carried out by having the business agents who called on the members at work in the stores give effect to this union policy as fully as possible (R. 33, 37, 40).

Compliance with the Union's "request" to its members to follow this policy was obtained by threats of fine or suspension to members who did not cooperate (R. 54, 75-76, 81, 82, 86, 91, 95, 98, 100).

As the Trial Examiner found, the facts were largely "undisputed" (R. 160). Thus, the evidence was undisputed that the conduct prohibited by the Board's order was undertaken by "a labor organization or its agents" (R. 16, 17, 163, 173).

It is equally undisputed that the union and its agents "induced and encouraged the employees of any employer to engage in" the conduct complained of. Such inducement admittedly occurred repeatedly at union meetings (R. 31, 35), in union bulletins and literature (R. 42-43, 53, 149), and in the very stores or "places of employment" themselves (R. 184, 40, 33, 37, 108, 110). The union members so induced were "employees" of the neutral secondary employers (R. 56, 59-60, 66-67, 68, 70).

Undisputed evidence also showed the conduct which the union sought to induce was "concerted", as it was directed to all the members assembled in the meetings, receiving the literature, or working in a visited store. Over 1400 of such members were employees employed in the markets (R. 31-32, 16-18). Under these facts, the Court below held that since the appeals were to members of a group, and encouraged parallel action, "It would be artificial to say that the Union did not encourage a unity of effort, and therefore concerted action" (R. I 230). The Court further held that the union appealed to such employees to "abuse the discretion delegated to them" and that accession thereto constituted a "refusal" within the meaning of the Act (R. I 231, 232).

The evidence further established that the employee conduct induced by the union came within the statutory pro-

scription. Such induced conduct was a refusal to perform "services" the employees were required "to perform". The Court below noted that "Congress here provided 'added safeguards' by inserting the 'alternative provisions' 'otherwise handle or work on any goods . . . or to perform any services,' so that the section would cover employee activity reasonably calculated to produce the results which Congress wished to prevent" (R. I 232).

Finally, the whole record before the Board and the Court below showed that the union had admitted their conduct was intended to achieve the specific objective proscribed by the Act: "(The Union's) action was designed and intended solely to disrupt business dealings between Swift and its non-union salesmen, on the one hand, and their immediate customers on the other." [5]

On the basis of all the evidence in the record as a whole, the Court below held "that the Board did not err in finding that the union's activities at the meat markets constituted violations of Section 8 (b) (4) (A)" and granted enforcement (R. I 235).

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[5] Page 29 of Union's Brief to the District Court in the 10 (l) proceeding, refiled as its brief to the Trial Examiner.

ARGUMENT.

This is a "Brief in Opposition" to a petition for a writ of certiorari, not a brief on the merits. At this stage we believe the merits are adequately stated by the foregoing "Statement of the Case," which sets out the facts, and by the clearly correct decisions of the Board and the Court below (R. I 186-206, 225-236a) which demonstrate how the law applied to those facts requires a finding that the union's conduct violated Section 8 (b) (4) (A) of the Act. Moreover, the Board, as principal Respondent, will undoubtedly demonstrate the propriety of the decision of the Court below in its own Opposition brief.

Intervenor, to avoid possible repetition, will therefore confine itself to demonstrating what it believes to be an unwarranted and misleading presentation of the "facts" and "questions presented," as set out in the Petition, apparently for the purpose of inducing this Court to grant certiorari when it is not justified. In effect, petitioner has phrased the Questions Presented to enhance the possibility of review, but with less than accurate reference to the record. The issues presented by Petitioner are not those presented by the case below.

A. The fundamental question presented.

At the outset, Petitioner presents the basic question as whether the union induced "the employees of any employer to engage in (a strike or) a concerted refusal in the course of their employment (to use, manufacture, process, transport, **or otherwise handle or work on any goods**, articles, materials or commodities) or to perform any services, where an object thereof is: Forcing or requiring any employer * * * (or other person **to cease** selling, **handling**, transporting or otherwise dealing in the products of any

other producer, processor, or manufacturer), or to cease doing business with any other person."

While petitioner purports to be presenting the fundamental issue at this point (Petition, p. 3) it truncated the above quotation from the statute by quietly omitting all that portion of the Act enclosed in parentheses in the above paragraph. Petitioner thus attempts to warp this Court's consideration of the petition at the very beginning, because the Court below specifically relied upon and quoted the omitted language in reaching its decision!

Thus, the Court below affirmed and granted enforcement to the Board order which found the Union had violated the Act because the object of its conduct was to force the neutral employers "**to cease handling Swift products and**" to cease doing business with Swift salesmen. The Court's enforcement decree repeated this by specifically enjoining conduct with the object of forcing neutral employers "**to cease handling** the products of Swift and Company" (Petition, pp. 38, 52; R. I 228, 237-238).

Again, in deciding that the particular employee-conduct here induced came within the statutory proscription, the Court below specifically relied upon the fact that, in listing the conduct proscribed, Congress provided "added safeguards" and significantly quoted the alternative provision "**otherwise handle or work on any goods** * * * or to perform any services" (Petition, p. 42; R. I 232).

We submit that the issue is deceptively stated when the specific language of the Act on which the Court below relied and ruled is innocently omitted from the quotation. The deception becomes important when it is realized that the basis of the union's appeal is that the Board and the Court below over-extended the scope and meaning of the remaining statutory language! (Petition for Cert., pp. 17, 18, 20, 22.) Petitioner charges the Court below disregarded

"words of limitation;" "substituted . . . its own views" for the Act's language; "rewrote the statute;" refused to restrict the scope "of the precise object proscribed." Such arguments sound plausible only if the reader has in mind petitioner's amputated text of the statute.

B. **The specific subsidiary questions presented.**

1. Petitioner presents the first question as whether "the exercise of discretion on behalf of an employer to determine with whom the employer will do business" is the type of employee activity against which the Act prohibits the union inducement here shown (Petition, p. 3). The union thus seeks to imply that all the employees unlawfully induced by them were high management officials with complete discretionary powers over purchases. Indeed, they specifically claim as "facts" that the neutral employers had delegated purchasing authority, including "full discretion," "to each one" of these buyer-employees (Petition, p. 6-7). They assert that this case does **not** involve "any buyer who had not been vested by his employer with **full** discretion" (Petition, p. 6, note 5).

Apparently the union felt it necesary to exaggerate the discretion held by the induced employees to the point where "each one" held "full discretion" in order to lend some credence to the first "question presented." But the effort must fail because the facts of this case are to the contrary and do not present the question petitioner seeks to raise. The real facts as found were (R. 161):

> "Some 1500 of such members are employed in those markets varying in size from one man markets to those of the big chain stores which employ several butchers each. In a large percentage of these markets the owners have authorized **one or more** of these employed butchers to purchase the meats necessary for the operation of the market. **This authority varies**

from complete discretion in regard to the amounts and sources of such purchases **to merely recommending what supplies are needed** to the purchasing agent."

Thus, the facts of **this** case show that the employees induced by the union were **not** all management agents with "full discretion" as petitioner erroneously contends. Their authority varied, some having power merely to "recommend" supplies needed to some other official, and the minimum authority employees were illegally induced by the union indiscriminately with the others.

The above quoted fact finding that the induced members were employed in **"the big chain stores** which employ several butchers each" further demonstrates the deception in petitioner's assertion that "the instant case does **not** involve buyers for **retail chain stores"** (Petition, p. 6, note 5). And the evidence establishes that at least four named chains each operated "a number of supermarkets," and that each of these stores employed one head meat cutter and two or more journeymen meat cutters—all members of the union (R. 2). Clearly, therefore, at least in the case of the chain store employers, the case involves inducement of a vast number of employees of these individual employees. Yet petitioner attempts to advise this Court that the buyers it induced "are each employed by a different employer" (Petition, p. 6).[6] The record shows otherwise.

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[6] The "Record" citations set out by petitioner to support this allegation are also revealing. At "pp. 39-40, infra," the Court of Appeals' opinion reads: "*The union says* that its appeals were directed at only one employee of each employer." The opinion then demonstrates that such contention is immaterial. At "R. 184" the Trial Examiner notes that "the *Respondent raises the question*" whether "one butcher for each market" can be concerted. He concluded merely "this presents an interesting problem." At "R. 204" the *dissenting* Board member, in disagreeing with a majority, expressed concern because "only one buyer in *each market acted* in response to the Union's appeals." One buyer in "each market"

Similarly, the union advises this Court that it is a "fact found" by the Court of Appeals and the Board majority that the buyers "were acting as agents of the employers" and "were performing a managerial function" (Petition, p. 7). But examination of petitioner's authority for such allegations shows reference is to the Court of Appeals opinion, which reads "**The Union says** . . . that its appeals were not addressed to 'employees' because the buyers were performing a managerial function and hence were acting as agents of their employees." The Court rejected that contention, and ultimately stated that whether such buyers ever acted in a management capacity as agents as the union argued was immaterial because "the Board treated the inducement or encouragement as directed to the buyers as **employees**, with ample support in the record" (Petition, p. 48; R. I 257). Instead of **facts**, petitioner's statement of the case sets out paraphrases of its own rejected arguments, deceptively arranged and quoted so at to certainly mislead this Court.

We submit that petitioners' presentation of the first question presented is misleading and deceptive, improperly advises the Court as to the issues in this case, and cannot justify granting the writ requested.

2. In presenting its second "question" (Petition, p. 4), petitioner wonders whether the statutory word "employees" shall be read as "employee". By this they seek to imply that the Court below held the Act was violated by inducement of one single employee. In fact, they con-

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operated by a chain would still leave many buyers employed by a single employer. At "R. 191, note 7," the Board's majority opinion reads: "*The Union further argues* that each market owner authorized only one of his employees to act as buyer"; the Board then rejects that argument. The "Record" citations supplied by petitioner thus provide no evidence or findings to support the allegation, but refer only to its own previously rejected argument of the same erroneous contention.

tend the Court's interpretation is precluded "because it takes at least two to make a concert" (Petition, p. 12). That requirement, we submit was more than met—this case was a symphony, no mere concert. Over 1500 of the union's members employed in the neutral markets were identically, and simultaneously induced to boycott (R. 161, 31, 35, 42-43, 53, 149, 184, 108, 110). The inducement was directed repeatedly at the entire membership in meetings, bulletins, and by personal visits to the shops. As above stated, at least in the cases involving retail chain stores, the union induced numerous "employees" of one single employer.

The Court below did **not** interpret the Act as prescribing inducement of "**the employee** of any employer" as petitioner would have this Court believe by its second question presented (Petition, p. 4), nor did it convert a solo into a concert as petitioner argues (Petition, p. 12). It had no occasion to read the word "employees" in any way other than as exactly written in the Act. As to the chain stores, the facts were directly within the statute under any interpretation. But as to the smaller stores, each employing only one or more (R. 161) of the induced employees, the Court had to consider the phrase "of any employer". Admittedly, a vast number of "employees" had been illegally induced (over 1500). But an almost equally large number of "employers" were involved, some employing only one or two employees. The question was whether the Act also prohibited inducement of a vast number of employees spread out over a large number of "employers". The interpretation needed involved the phrase "of any employer", not the word "employees", as petitioner misleadingly asserts.

Congress had not been explicitly clear. It could have prohibited inducement of the "employees of a single employer" or the "employees of any employer whatsoever"

and perhaps thereby dispelled doubt one way or the other. But the Court below was not without guides. Congress had clearly said in Section 2 (3) that the term employee "shall **not be limited** to employees of a particular employer, unless the Act **explicitly** states otherwise." This conformed to the general rule of statutory construction in 1 U. S. C., Sec. 1, that "words importing the singular include and apply to several persons" and "words importing the plural include the singular." The legislative history was in agreement:

> "The term 'employee' is **not limited** to the employees of a particular employer. The reasons for this are as follows: Under modern conditions employees at times organize along craft or industrial lines and form labor organizations that extend **beyond the limits of a single employer unit** . . . In the course of this relationship controversies involving unfair labor practices may arise. If this bill did not permit the government to exercise complete jurisdiction over such controversies (arising from unfair labor practices), the government would be rendered partially powerless, and could not act to promote peace in those **very widespread controversies** where the establishment of peace is most essential to the public welfare . . . After deliberation, **the committee decided not to exclude employees working for very small employer units.**" Senate Report 573, 74th Congress. (Emphasis added.)

Accordingly, the Board and the Court below decided, and with ample support from the record and the authorities, that

> "The effect of the Union's activity is the same in this case, where many employees of various employers are involved, as it is where many employees of a single employer are involved. Congress must have

intended section 8 (b) (4) (A) to apply to this type of situation" (Petition, p. 40; R. I 230).[7]

We submit that petitioner's second "Question Presented" is also misleadingly phrased to deceive this Court so as to obtain review on spurious issues not actually involved.

3. We shall not treat the remaining "Questions Presented" by petitioner in detail, but submit that they are equally deceptive as the two above discussed. For example, No. 3 (Petition, p. 4), is again based on the false assumption that the butchers were "each employed by a different employer" and that the action the union directly induced in these 1500 employees was "individual", as distinguished from "concerted". See opinion of Court below (Petition, pp. 40-41; R. I 230-231). The remaining "Questions Presented" are similarly covered by the opinion. (Question 4, see Petition, pp. 41-42, R. I 231-232; Question 5, see Petition, pp. 42-43, R. I 232-233; Question 6, see Petition, pp. 44-45, R. I 234-235.)

4. We will mention only one last example to demonstrate that the misleading nature of the Petition extends to the Argument as well as the Statement of Facts and Questions Presented.

In discussing its "primary-secondary" argument, petitioner contends that the decision of the Court below is plainly incompatible with NLRB v. International Rice Milling Co., 341 U. S. 665, 671, and asserts that this Court there "recognized that the picketing was 'directed beyond' employees of the mill and was intended to induce employees of neutral employers not to cross the line."

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[7] This holding does not conflict with the Seventh Circuit's decisions in Joliet Contractors v. NLRB, 202 F. (2) 606, 612, because, as the Court below noted (Footnote 5, petition, p. 40; R. I 230), the language involved in the Joliet opinion was dicta.

Petitioner implies that the cited case bars the decision of the Court below that the union's direct inducement of over 1500 members of a group, all employees of neutral employers, encouraging parallel action, unity of effort, and "therefore concerted action", where such inducement occurred at union meetings, in union bulletins, and in the neutral stores (not at the primary employer's premises), violates Section 8 (b) (4) (A).

The Rice Milling case, as reported, warrants no such assertion. The facts there showed no more than "that the union, in the course of picketing the Kaplan Mill, did encourage two employees of a neutral customer to turn back from an intended trip to the mill." Showing that the decision there had no application to the type of facts here involved, the Court said:

> " * * * That language contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets' request to a driver of a single truck to discontinue a pending trip to a picketed mill. There was no attempt by the union to induce any action by the employees of the neutral customer which would be more widespread than that already described. **There were no inducements or encouragements applied elsewhere than on the picket line.** The limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive. **The picketing was directed at the Kaplan employees and at their employer** in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by § 8 (b) (4). **Insofar as the union's efforts were directed beyond that** and toward the employees of anyone other than Kaplan, **there is no suggestion that the union sought concerted conduct by such other employees.** * * * " (Emphasis added.) 341 U. S. 665, 671, 95 L. Ed. 1282.

CONCLUSION.

The decision of the Court below affirming and enforcing the Board's order, so far as it involves the points raised in this petition (No. 677), is eminently correct as to its conclusions of law and clearly supported by the evidence on the record as a whole as to its findings of fact. Petitioner seeks review on the basis of issues drawn and questions presented that are not fairly stated and are not truly presented by this case. In effect, petitioner seeks to present a hypothetical case for review.

In addition, the decisions of the Board and the Court below conform to the principles announced by this Court in the Secondary Boycott Cases. International Brotherhood of Electrical Workers v. NLRB, 341 U. S. 694; NLRB v. Denver Building and Construction Trades Council, 341 U. S. 675. Those cases recognized the broad application of Section 8 (b) (4) and absence of Congressional intent to limit its proscription to cases involving particular "means." In the I. B. E. W. case the Court specifically rejected the contention of the union there because it "would give more significance to the means used than to the end sought." 341 U. S., loc. cit. 702. The petitioner's position here contains the same fatal defect.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
Section 8(b)(4)(A)	2, 3, 8, 9, 10, 11, 12
Section 10(c)	11
Section 10(l)	5
1 U.S.C. 1	14

Miscellaneous:

H. Rep. No. 1147, 74th Cong., 1st Sess., 24	12
S. Rep. No. 573, 74th Cong., 1st Sess., 15	12

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 624

SWIFT & COMPANY, A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL, LOCAL 88

No. 677

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL, LOCAL 88, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND SWIFT & COMPANY

ON PETITION AND CROSS PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The principal opinion of the court below (Pet. 17-28)[1] is reported at 237 F. 2d 20. The opinion on petitions for rehearing (Pet. 29-30) is reported at 237

[1] References designated "Pet." are to the Petition in No. 624. "Cr. Pet." refers to the Cross Petition in No. 677. "R" references are to the Joint Appendix filed in the court below.

F. 2d 27. The findings of fact, conclusions of law, and order of the Board (R. 186-206, 157-185) are reported at 113 NLRB 275.

JURISDICTION

The judgment of the court below (Pet. 37-38) was entered on June 23, 1956. Petitions for rehearing by Swift and by the Union and a second petition for rehearing by the Union were denied on September 13, 1956, and on October 8, 1956, respectively, the latter without opinion. The petition for a writ of certiorari in No. 624 was filed on December 12, 1956; the cross petition in No. 677 on January 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under Section 10(f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

The Board found that the Union violated Section 8(b)(4)(A) of the National Labor Relations Act, as amended, when its officers and agents, in an effort to organize Swift salesmen, called at retail meat markets and there induced and encouraged Union members who were employees of the meat markets not to purchase Swift products in the course of their employment, with an object of requiring the meat markets to cease doing business with Swift.

The only question presented in No. 624 is whether the Board was required to consider and determine the further issue whether like inducement and encouragement made in Union meetings or through Union bulletins also constituted a violation of Section 8(b)(4)(A).

The questions presented in No. 677 are:

1. Whether substantial evidence on the record considered as a whole supports the Board's finding.

affirmed by the court below, that the Union induced employee-buyers of the meat markets to refuse, in the course of their employment, to purchase meat from Swift salesmen.

2. Whether, on the facts of this case, the Board and the court below properly concluded that the following requirements of Section 8(b)(4)(A) were satisfied: that the forbidden inducement must be directed to "employees of any employer"; that the action sought to be induced must be "concerted"; and that the object forbidden must be "forcing or requiring" an employer to cease doing business.

3. Whether the Board and the court below properly rejected the Union's claim that its action was primary and hence protected.

STATUTE INVOLVED

The statutory provision here directly involved is Section 8(b)(4)(A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), which reads as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to

join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

STATEMENT

I

The Findings, Conclusions, and Order of the Board

A. *Background events*

The Union is the collective bargaining representative of, and includes in its membership, "the meat department employees in practically all retail grocery stores, supermarkets, and meat markets in and about the City of St. Louis, Missouri" (R. 187; 16). The duties of the meat department employees in the various markets include a number of functions such as cutting, packaging, displaying, weighing, wrapping, pricing, selling at retail, and buying at wholesale (R. 161, 189; 30a-30b). In the larger markets, the buying of meat is handled through the store manager who acts upon preliminary orders prepared by journeymen meat cutters (R. 161; 30(b), 106). In other markets, a meat department employee, who often is the sole employee or works with one or two helpers, is responsible for making purchases (R. 161; 21, 56, 67, 68, 70-71). The extent of such employee's discretion in buying at wholesale varies; in some instances, the market owner will give certain affirmative instructions; in other instances, he will overrule the employee on specific buying policies; and in still other instances, the employee is given no specific instruction as to the manner in which the

purchasing is to be done (R. 161; 20-21, 25-26, 27, 57, 60-61, 67, 70-71). While the Union membership employed in meat markets includes some supervisory personnel, the bulk of the members have no authority to hire, fire, discipline, or supervise other employees; but, very frequently, they are authorized, as indicated above, to make wholesale purchases of meat (R. 161, 188, 189; 57, 67, 70-71, 85, 86).

Swift's St. Louis subsidiary, the Independent Packing Company, is one of the meat suppliers normally patronized by the meat markets in the St. Louis area (R. 161-162; 71-72, 75, 80-81, 87-88, 98, 99-101). Swift sells its products through salesmen who make periodic calls in person or by telephone to the meat markets where they solicit orders from the buyers (*ibid.*). In the fall of 1953, the Union undertook to enlist Swift's salesmen, who were unorganized, in its membership (R. 161; 17, 112, 114, 115). The Union initiated the campaign by placing pickets at Swift's plant bearing signs stating that the salesmen were non-union (R. 162; 17, 112-113). On September 11, 1953, the day after this picketing began, Swift obtained an order from the Circuit Court of St. Louis which enjoined all further picketing at Swift's plant (R. 162; 17.) [2] Following issuance

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[2] Concurrently with a suit initiated under Section 10(l) of the Act in the United States District Court for the Eastern District of Missouri to obtain interlocutory relief against the Union's unfair labor practices as alleged in the complaint before the Board (R. 9-12, 15), the Board filed another suit in the same court seeking to nullify the effect of the state court injunction. The district court granted the relief sought in the Section 10(l) proceeding but refused to restrain Swift from further availing itself of the state court injunction against the picketing. *National Labor Relations Board* v. *Swift & Co.*, 130 F. Supp. 214 (E.D. Mo.), affirmed on appeal, 233 F. 2d 226 (C.A. 8).

of this order, the Union continued its efforts to organize Swift's salesmen by different tactics. These tactics, described immediately below, were the basis of the Board's unfair labor practice findings.

B. *The boycott appeals*

On September 23, 1953, the Union announced at a regular membership meeting that Swift's salesmen were not Union members, and that it was the Union's firm policy that its members "should only patronize salesmen who were members of [the Union], that the members of [the Union] should buy only merchandise from members of [the Union] and that they should patronize and support only members of [the Union]" (R. 162-163; 17-18). Thereafter this policy was reiterated at monthly Union meetings which were attended by substantially all members, and the membership was repeatedly requested to adhere to it (R. 163; 18, 31, 35-36, 116). The Union's bulletins, mailed to its members quarterly, contained similar appeals that the membership refrain from purchasing Swift's products (R. 163; 32, 42, 46, 118, 149).

In addition to the announcements made at the Union's meetings and through its bulletins, the Union sought to effectuate its policy of boycotting Swift's products through personal appeals made to members at the markets where they were employed. Thus, the Union's president, Nick Blassie, called on members at the markets and "urged the [Union members] to buy only from union salesmen, and * * * not to buy Mayrose [Swift brand] products" (R. 187-188; 39-40). Similarly, Union business agents, who spend almost all of their

working hours performing Union functions at the markets where members are employed (R. 33-34, 110), urged members to follow the Union's policy not to buy Swift's products (R. 187-188; 85, 99-101, 110). Concurrently with the inducement of its members to boycott Swift's salesmen, the Union requested and authorized its members to solicit the salesmen to join the Union when the latter called at the markets (R. 163; 29, 116). Indeed, when Swift's salesmen inquired of Union members the reason for the boycott against Swift's products, they were encouraged to join the Union and were told that, upon their becoming members, normal purchasing of Swift products would resume (R. 163; 72, 75, 84, 88-89, 101).

Union members generally complied with the appeals made to them by Union officials. On many occasions, the buyers at the markets told Swift salesmen, when the latter were soliciting orders, that they would be subject to fines or other disciplinary action by the Union if they were to violate the boycott policy (R. 165, 167-168; 54, 75, 95, 98). In a few instances, the owner or manager of the meat market whose buyer refused to order Swift products was informed of the situation; at least one owner overruled the buyer and insisted that Swift be patronized (R. 163-164; 25-26, 27, 55-56); other owners indicated either an acquiescence in the Union's policy or an unwillingness to interfere with the buyer's discretion in making purchases (R. 163; 76, 86, 92, 94-95, 101). The overall result of the Union's boycott policy was that the quantity of meat Swift normally sold to markets through the Union-member buyers was substantially reduced (R. 164; 72, 75, 76, 87-88, 90).

C. *The Board's conclusions and order*

Upon the foregoing facts, the Board, one member dissenting, concluded that the "Union violated Section 8(b)(4)(A) of the Act by inducing employees, at their places of employment, to refuse on behalf of their employer to buy Swift products from Swift salesmen, with an object of forcing or requiring their employers to cease handling Swift products and cease doing business with the Swift salesmen" (R. 206, 192). In support of this conclusion the Board found, preliminarily, upon the evidence in the record, that the Union did not confine its boycott efforts to member-buyers who were supervisors or management representatives but also induced member-buyers who were "employees" within the meaning of the Act (R. 191).[3] In this respect, the Board found that the employee-buyers involved were not vested with an unfettered discretion to buy as their own inclinations, however motivated, dictated, but rather that their discretion was to be exercised in the employer's interest, "i.e., to determine solely on the basis of objective criteria whether the purchase of Swift products was in the interest of their employer" (R. 189, 192). Accordingly, it concluded that when the employee-buyers decided, solely because of Union interests, not to buy Swift products they were refusing in the course of their employment to perform a "service" within the meaning of the Section 8(b)(4)(A) prohibition (R. 188-189).[4] Finally, the Board re-

[3] Inasmuch as the Union sought to induce large numbers of employees of different employers to engage in parallel action directed at Swift, the Board found that the statutory requirement of inducing "concerted" action was met (R. 191, n. 7).

[4] As the Board pointed out (R. 189, n. 5), the inducement of employees not to buy Swift products for resale by their employer differs materially from the traditional consumer boycott.

jected the Union's contention that its inducement of the secondary employers' buyers should be viewed like the picketing of a primary employer's premises for organizational purposes with only an incidental effect on the neutral's employees. The Board noted (R. 190) that here there was no picketing; that the appeals at the stores were aimed directly at the employees of the neutral companies without regard to the presence of Swift salesmen; and that the "roving situs" decisions (permitting a union, under appropriate circumstances, to picket primary employers at the situs of a neutral employer) were inapposite.

Having found that the inducement at the retail markets violated Section 8(b)(4)(A) of the Act, the Board did not "find it necessary to consider or pass on the Union's additional conduct within its own organization [the appeals at Union meetings and in Union bulletins] * * *" (R. 192). Accordingly, the Board directed, in the language of the statute, that the Union cease and desist from the unfair labor practice found and that it post appropriate notices (R. 193-194).

II

The Decision of the Court Below

The Union filed a petition in the court below (Case No. 12891) to set aside the Board's decision and order. Swift filed a cross petition (Case No. 12931), consolidated with Case No. 12891, complaining of the Board's failure to pass on the legality of the Union inducement at Union meetings and through Union bulletins. The court below unanimously sustained the Board (Pet. 17-28) and reaffirmed its determination upon petitions for rehearing (Pet. 29-30). The court noted, as had the

Board, that the inducement found violative of the Act was that addressed to the buyers who were acting in the capacity of employees and not to the buyers who were acting in the capacity of representatives of management (Pet. 30). Similarly, the court, like the Board, rejected as untenable the Union's contention that, because only one employee of each employer was induced, the statutory proscription of Section 8(b)(4)(A) against inducing "employees of any employer" was inapplicable, and also dismissed the Union's related contention that it did not induce "concerted" activity by the buyers (Pet. 21-23). The court likewise sustained the Board's evidentiary finding that the buying discretion vested in the employee-buyers was one to be exercised solely in the employer's interest, and that their refusal to buy Swift products because of the Union's interests constituted an abuse of the discretion delegated to them and a refusal to perform a service they were hired to perform (Pet. 23-24). Finally, the court rejected the Union contention that, because the Union's real object was the organization of Swift salesmen, the Board erred in finding that a Union "object" was "forcing or requiring their employers to cease handling Swift products and cease doing business with Swift salesmen" (Pet. 24-25, R. 206); the claim that the evidence did not support a finding of inducement of employees (Pet. 25-26); and the argument that the purchase boycott was permissible either on the ground that it was a primary boycott or by analogy to the "roving situs" cases (Pet. 26-27).

Accordingly, the court below enforced the Board's order insofar as it prohibited unlawful inducements

occurring at the markets (Pet. 27). However, it did not accede to Swift's request that the order also be read to proscribe the appeals made at Union meetings and through Union bulletins. Noting that the Board had not passed upon or decided this issue, the court concluded: "Under the circumstances here presented we do not think the statute made such a decision mandatory upon the Board, or that we are required to remand the case for such a decision by the Board" (Pet. 30).

ARGUMENT

No. 624

The Board expressly refrained from passing on the legality or illegality of the Union's conduct with respect to inducing employee-buyers at Union meetings and through Union bulletins not to purchase Swift products for resale. The question on this branch of the case is whether the Board, having found that the Union's conduct at the meat markets was violative of Section 8(b)(4)(A) of the Act and having remedied that violation, was required to pass on the additional question whether the Union's conduct within its own organization was likewise violative of the Act. Preliminarily, it should be noted that the Board is not required to pass on every issue which is litigated before it. *American Newspaper Pub. Ass'n* v. *National Labor Relations Board*, 193 F. 2d 782, 798 (C.A. 7). And see *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18. This is particularly true where, as here, a question of remedy is involved. Section 10(c) vests in the Board a broad discretion to determine, where unfair labor practices have occurred,

what remedy, if any, will serve the statutory purposes.[5] Thus, the Board is empowered to broaden or narrow the relief given for unfair labor practices as the particular circumstances of the case may warrant. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 436-437. And, by the same token, the Board may limit the scope of its decision and the concomitant relief if it is of the view, under all the circumstances of the case, that the relief already afforded will adequately effectuate the policies of the Act. See *American Newspaper Pub. Ass'n* v. *National Labor Relations Board, supra.*

The Board applied the foregoing principles. Confronted with allegations that Section 8(b)(4)(A) had been violated both with respect to the Union's appeals to members at their places of employment and with respect to the Union's appeals "within its own organization," the Board found that the Section had been violated with respect to the former and issued a broad order enjoining that and like or related conduct. On the basis of the whole record, the Board deemed this remedy adequate and found it not "necessary to consider or pass on the Union's additional conduct within its own organization . . . " (R. 192).[6] This determina-

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[5] See H. Rep. No. 1147, 74th Cong., 1st Sess., 24; S. Rep. No. 573, 74th Cong., 1st Sess., 15; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194-195; Cf. *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U.S. 31, 46-47.

[6] *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96 (C.A. 3), cited by petitioner (Pet. 15) is wholly distinguishable. In that case, the Third Circuit held that the Board abused its discretion when it dismissed the entire complaint after refusing to afford the complainant an opportunity to introduce sufficient evidence to show necessary impact on interstate commerce. In so holding, however, the court noted (at p. 100) "that the jurisdiction of the Board is not a compulsory jurisdiction. Assuming that all circumstances looked to by the Act are in existence, none the less we are of the

tion was peculiarly within the Board's province and it presents no question appropriate for review.

No. 677

1. The Union does not challenge (Cr. Pet. 7, n. 7) the finding that it called upon its members who were employed at the meat markets, and that, in furtherance of its ultimate object of organizing the Swift salesmen, it induced those members not to buy from Swift. And both the Board and the court below found as a fact that among the members so induced were not only buyers who might properly be considered as representatives of management, but also buyers with limited authority who were employees within the meaning of the Act, possessing neither supervisory nor managerial representative status (R. 191, Pet. 30).[7] Indeed, the basic misconception underlying much of the cross petition springs from the Union's reluctance to acknowledge the Board's finding, sustained by the Court of Appeals, that the discretion vested in the employee-buyers was not an unlimited discretion, but merely a discretion "to determine solely on the basis of objective criteria whether the purchase of Swift products was in the interest of their employer" (R. 189; Pet. 23). To the ex-

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opinion that the Board does not have to cause a complaint to be issued against the employer or proceed to prohibit any unfair labor practices complained of. The course to be pursued rests in the sound discretion of the Board and is the concern of expert administrative policy."

[7] Compare *Swift & Co.*, 115 NLRB 752, upon which the Union relies (Cr. Pet. 10, 19), where the Board held certain procurement drivers vested with substantial discretion to be managerial representatives, with *Farmers Union Livestock Ass'n*, 116 NLRB No. 133, where the Board distinguished the *Swift* case and held that procurement drivers with more limited authority and skill were not managerial employees.

tent that the Union induced the employee-buyers to disregard their employers' interests and to make their purchase determinations on the basis of Union considerations, it necessarily induced employees to refuse, in the course of their employment, to perform a service which they were hired and paid to perform (R. 188-189, 191-192, Pet. 20-21, 23-24).

2. Relying on the circumstance that its appeals were directed to the single employee in each market who had authority to buy, and that the action sought of such employees was their refusal to order meat from Swift salesmen, the Union argues that it did not induce "employees of any employer" and that it did not request "concerted" action within the meaning of those statutory terms (Cr. Pet. 4, 12-13, 20-21). Neither phase of this contention raises a question warranting review. The facts are that the Union appealed to a large number of employee-buyers, that the object of the inducement was to procure the combined action of these buyers, and that the buyers collectively responded to the Union's boycott policy. On these facts, the Union's effort to escape liability on the basis of a technical grammatical construction of the quoted statutory phrases is merely an effort to circumvent "the evident intent of the statute." *First National Bank* v. *Missouri*, 263 U.S. 640, 657. Moreover, as the court below pointed out (Pet. 21), elementary principles of statutory construction, legislatively codified and judicially approved, preclude so narrow a reading. See 1 U.S.C. 1; *First National Bank* v. *Missouri*, *supra*.

The Union's reliance upon *Joliet Contractors Ass'n* v. *National Labor Relations Board*, 202 F. 2d 606 (C.A. 7), and *National Labor Relations Board* v. *Interna-*

tional Rice Milling Co., 341 U.S. 665, is misplaced. In *Joliet*, the court agreed with the Board that two separate incidents, each involving a single employee, did not show "a concerted refusal."[8] In the *International Rice Milling* case, the record revealed only a single request by a picketing union "to a driver of a single truck to discontinue a pending trip to a picketed mill. There was no attempt by the union to induce any action by the employees of the neutral customer which would be more widespread than that already described." There were no inducements made beyond "the geographically restricted area near the mill." 341 U.S. at 671. In the instant case, the actions took place not at Swift's but at the places of business of the neutral customers, and the very purpose of the inducements was to obtain unified adherence by the neutrals' employee-buyers to the boycott of Swift products.

3. For the reasons already suggested, there is no basis for the Union's argument that the initiation of the boycott at the neutral employers' places of business was primary rather than secondary activity. It can scarcely be gainsaid that "an object" (*National Labor Relations Board* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689) of the Union's action was to force the cessation of business between the neutral market owners and Swift, at least insofar as inducing refusal to buy Swift products would necessarily bring about a cessation of such business (Pet. 25).[9] And the

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[8] The particular statement upon which the Union relies (Cr. Pet. 20-21) is not only dictum, as the court below noted (Pet. 22, n. 5), but was made in a quite different factual context.

[9] Contrary to the Union's claim, *Douds* v. *International Longshoremen's Association*, 224 F. 2d 455 (C.A. 2), certiorari denied, 350 U.S. 873, does not support its position. In holding that the ces-

Union's effort to analogize the Union's conduct with respect to the neutral market owners with conduct "which is directed against the primary employer at a primary situs of the dispute" (Cr. Pet. 23) simply ignores the facts. The circumstance that Swift salesmen on occasion solicited orders at the neutral markets does not support the Union's claim (Cr. Pet. 28) that the neutral markets were the primary situs of the dispute even when the Swift salesmen were not present at the markets. Nor is the Union aided, as the court below observed (Pet. 26-27), by resort to the "roving situs" cases. In these cases, unlike the instant one, the union appeals were made to primary employees who were carrying on operations at the same place where neutral employees were at work, and the question was whether the incidental effect upon the neutral employees was a permissible by-product of the primary action.

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sation of business was not an object of the strike in that case, the Second Circuit relied wholly on the fact that the strike resulted from inter-union rivalries in a representation contest and not from any dispute with the employer. See the discussion in the opinion at pp. 458-459.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari in No. 624 and the cross petition for a writ of certiorari in No. 677 should be denied.

Respectfully submitted,

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No. 677

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Intervenor.

BRIEF FOR CROSS PETITIONER IN NO. 677 IN REPLY TO BRIEFS IN OPPOSITION.

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BRIEF FOR CROSS PETITIONER IN NO. 677 IN REPLY TO BRIEFS IN OPPOSITION.

1. The Board now contends that this case does not pose the question whether the term "services" as used in Section 8(b)(4)(A) comprehends the managerial prerogative of exercising discretion in determining from whom and on what terms an employer should make purchases (Br. pp. 13-14). It argues that the scope of discretion vested in these buyers was too limited to warrant regard-

ing their performance of the buying function as managerial. And it analogizes (Br. p. 13, note 7), to *Farmer's Union Livestock Assn.*, 116 NLRB No. 133, where the procurement function performed by unskilled route drivers, whose employer fixed in advance the price the drivers could pay, and permitted them virtually no discretion even with respect to source and kinds of purchases, was held not managerial.

The contention ignores the Board's findings (R. 191, 192, 184-185), which were based on uncontradicted testimony (R. 92, 93-94, 24, 25, 70), and adopted by the court below (Cross Pet. pp. 41, 42, note 6), that the market owners in this case expressly "placed no limitation on a buyer's discretion" and the Board's own admission in the court below that the scope of the buyers' discretion was limited only by the requirement that they were to "buy in accordance with the best interests of their employer; *to be guided by such considerations as customer demand and price*" (Brief for the Board in the court below p. 37; italics added). That judgment must rest on "objective criteria" does not establish that the discretion which must be exercised in making the judgment is insubstantial.[1] It is simply beyond dispute that the scope of discretion vested in the buyers in this case is far greater than that vested, for example, in the procurement drivers in *Swift & Co.*, 115 NLRB 752, whose purchasing function the Board held managerial.

1. The finding that the buyers were limited to consideration of such "objective criteria" as customer demand and price was based entirely upon the fact that prior to the boycott the buyers "normally made substantial purchases of Swift products from the Swift salesmen, but that such purchases fell off markedly because of the Union's boycott" (R. 192). The finding that the buyer was to exercise his discretion only in the best interests of his employer was derived entirely from the law of agency (R. 192, note 8). Limitations of this character would apply equally to all buyers. If they sufficed to establish that a buyer did not exercise substantial discretion, the purchasing function could never be held managerial.

In any event, the Board did not find that the purchasing function performed by these buyers was not managerial. On the contrary, the Board found that the term "services" applied to it solely because it construed the word "services" as comprehending every activity performed for an employer by a person who is an "employee" within the meaning of the Act (R. 188-189, 191). The attempt of counsel at this stage to supply a new and different rationale for the Board's conclusion flouts the teaching of *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94.

In the court below the Board attempted to justify its holding on the ground that because the buyers spent a majority of their time in employee activity of various kinds, rather than in purchasing, the Board properly treated them as "employees" for all purposes (Response of the Board to Petitioner's Motion to Lodge Two Decisions and Orders of the Board, pp. 1-3). The court below, in its opinion on rehearing, appears to have adopted the same approach. In its brief in opposition, however, the Board has abandoned this defense, apparently recognizing that it evades rather than answers the question of construction of the term "services" which is here squarely presented.

The character of a service does not change depending on whether an employee or an agent of the employer performs it. Rather, it is the character of the service which determines whether, in performing it, one is acting as an agent or an employee. If the exercise of discretion in purchasing is, as the Board uniformly holds, a "managerial function", then union inducement directed, as here, only to an employee's performance of that function is not reached by Section 8(b)(4)(A) unless the term "services" is not restricted to "employee activity" but comprehends managerial functions as well.

2. The reference in the briefs in opposition to certain

buyers whose authority in the field of purchasing was expressly limited, *i.e.*, to those who were required to consult with the market owners before making purchases, or were told from whom to buy (Bd. brief, pp. 4-5, 13; Brief for intervenor Swift, pp. 6, 12-13), is entirely misleading. Because the Board found that the Union induced its buyer-members to refrain from purchasing from Swift only if they were permitted by their employers to do so (R. 163, 166, 191-192), the Board held that the inducement extended only to those buyers whose authority and discretion to select among suppliers had not been expressly limited by their employers. Thus, the Board found that the Union's appeal was illegal only insofar as it was addressed to "certain meat buyers" (R. 187),[2] that is, to those who, it said, were vested with discretion "to determine * * * whether the purchase of Swift products was in the interest of the employer" (R. 189).

However, even if the Union's inducement had been held also to have extended to buyers whose authority was expressly limited, the question posed by the cross petition would require resolution. For the Board specifically found the inducement illegal as it applied to buyers whose authority was not expressly limited, and its order, as enforced below, enjoins future appeals to them. The validity of the findings and of the order in this respect is clearly in issue and clearly warrants review.[3]

2. Of course the appeals were addressed to all union members in their capacity as ultimate consumers, but the Board expressly found that in that respect the appeals were not unlawful (R. 189, note 5).

3. Intervenor's version of the issues is predicated upon factual contentions which it urged, unsuccessfully, upon the Trial Examiner, the Board and the court below. Compare intervenor's argument that the Union's inducement, insofar as here relevant, was addressed to more than one employee of any particular employer (Br. p. 15), with the Board's admission that the Union's appeals "were directed to the single employee in each market who had authority to buy and that the action sought of such

3. The briefs in opposition ignore the Board's specific findings (Cross pet. pp. 7-8), that the course which the Union urged upon the buyers left every market owner free to continue doing business with Swift merely by instructing his buyer to do so, and that cessation of purchasing occurred only with each market owner's "acquiescence and consent". By omitting these crucial findings they evade subsidiary questions numbered 4 and 5, posed by the cross petition, pp. 4, 13-15, 21-22.

4. The Board's brief in opposition does not challenge our demonstration that under the Board's prior construction of Section 8(b)(4)(A) the conduct here in issue would have been held lawful both because, under that construction, the language of the Section does not reach it, and because the buyer conduct induced would have been held primary, not secondary. The Board does not attempt to deny the vast importance to the field of labor relations of the questions of statutory construction here presented, nor does it deny that the conflicts in approach between the Circuits show them ripe for resolution. For the reasons stated in our cross petition, certiorari should be granted.

Respectfully submitted,

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employees was their refusal to order meat from Swift salesmen" (Br. p. 14). Intervenor's assertion that the phrase "otherwise handle or work on any goods" in Section 8(b)(4)(A) is relevant is foreclosed by the Board's specific rejection of Swift's contention that the Union induced any employee "to refuse to handle, use, sell, work on, *etc.*—as distinguished from buy—Swift products" (R. 168), and its square holding that the inducement directed to buying was illegal solely because buying is a "service" as that term is used in Section 8(b)(4)(A). (R. 189).